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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1982

CUMIS INSURANCE SOCIETY, INC.,
Petitioner,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit or,
Alternatively, Petition for Writ of Mandamus

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND THE PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Whether the District Court properly exercised its discretion in ordering production of documents which the court determined were relevant to the subject matter of this litigation.
2. Whether a writ of mandamus should issue to review the District Court's discretionary decision to compel production of documents.

PARENTS, SUBSIDIARIES AND AFFILIATES

Government Employees Credit Union is a state chartered credit union which has no parents, subsidiaries or affiliates.

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The respondent, Government Employees Credit Union, respectfully prays that the petitioner's request for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit, entered on October 1, 1982, be denied and that the petitioner's alternative request that a writ of mandamus issue to the Honorable H. F. Garcia, Judge, United States District Court for the Western District of Texas, Austin Division, also be denied.

STATEMENT OF THE CASE

On January 12, 1982, CUMIS Insurance Society, Inc. ("CUMIS") filed its Complaint in the United States District Court for the Western District of Texas, against Government Employees Credit Union ("GECU"), nine individuals who were then members of the Board of Directors of GECU, and Doris Dees Bolton, formerly President, Treasurer, and a director of GECU. CUMIS' First Amended Complaint, filed on August 5, 1982, added as defendants two former directors of GECU and Texas Share Guaranty Credit Union, a state chartered credit union which guaranteed GECU and has entered into a conservatorship agreement with GECU. Except for the addition of three defendants, the Complaint and First Amended Complaint were substantially identical. CUMIS sought a declaratory judgment that: (1) GECU's claim against CUMIS under its credit union discovery bond for losses suffered by GECU as a result of Doris Dees Bolton's failure to well and faithfully perform her duties is not recoverable, because GECU had not suffered a direct loss of property caused by the failure of an employee to well and faithfully perform her duties (Resp. App. 11a);¹ (2) GECU's claim under the discovery bond is not recoverable because of GECU's failure to comply with the notice and proof of loss provisions of the bond (Resp. App. 11a); and (3) CUMIS has no duty or obligation to the defendant directors under CUMIS' Directors and Officers Liability Policy because GECU's claim against the directors violates public policy and is not within the scope of coverage of the policy, and because of the defendant directors' and GECU's failure to cooperate (Resp. App. 13a).

On January 29, 1982, GECU filed its answer to CUMIS' Complaint, its counterclaim against CUMIS (Resp. App. 30a), and a crossclaim against all other defendants. GECU's Answer to CUMIS' First Amended Complaint was filed on August 23, 1982 (Resp. App. 19a). GECU's counterclaim against CUMIS included six counts alleging that: (1) CUMIS had breached its

¹ References denoted Resp. App. are to the appendix to this brief. References denoted Pet. App. are to the appendix to CUMIS' petition.

contract with GECU by refusing to pay GECU's claim for direct loss of property caused by the failure of Doris Dees Bolton to well and faithfully perform her duties (Resp. App. 30a); (2) CUMIS had engaged in unfair claims settlement practices generally and, in particular, by its refusal to discuss settlement of the claim and its attempt to intimidate the directors of GECU to breach their duties to GECU and its members (Resp. App. 32a); (3) if the construction of the discovery bond sought by CUMIS in its declaratory judgment action were correct, then CUMIS had misrepresented to GECU that the bond would fulfill GECU's statutory obligation to maintain effective blanket security bond coverage (Resp. App. 34a); (4) CUMIS had misrepresented to GECU the nature and extent of the coverage provided by the discovery bond and/or the terms, benefits and advantages provided by the bond, which misrepresentations constitute deceptive trade practices in violation of Texas law (Resp. App. 34a); (5) CUMIS further misrepresented the nature and extent of the Directors and Officers Liability Policy procured by GECU for its directors, said misrepresentations and omissions of material fact being in violation of Texas law (Resp. App. 35a); and (6) CUMIS' willful failure and refusal to investigate and settle GECU's claim between the period from February 15, 1980, and May 20, 1981, had resulted in monetary damages to GECU in addition to the loss which was the subject of its primary claim (Resp. App. 36a).

GECU filed its First Request for Production of Documents to CUMIS on February 2, 1982 (Pet. App. 1). CUMIS' response to the request for production of documents, filed on March 8, 1982, objected in general terms to virtually every request on the grounds that the requests were overly broad, sought production of privileged matters and trial preparation materials, and were not relevant (Pet. App. 2). On March 18, 1982, GECU communicated to CUMIS a suggestion for compromise with respect to the document production (Resp. App. 59a). CUMIS having rejected that compromise proposal and having failed to suggest a counterproposal, GECU filed its Motion to Compel Discovery on May 10, 1982 (Pet. App. 3). GECU's Memorandum in Support of Motion to Compel Dis-

covery argued that CUMIS' objections were insufficiently specific to carry its burden of demonstrating grounds for refusing to produce the documents (Resp. App. 42a). CUMIS responded to the motion to compel production on June 24, 1982, again arguing: (1) that the requests were burdensome, although CUMIS provided no factual information concerning the volume of documents involved in responding to the requests, the manner in which such documents were stored or organized, or other information concerning the alleged burden of production (Pet. App. 4, pp. 2-3); (2) that some of the requested documents were not relevant because they related to other claims made under provisions of the policy at issue in this litigation (Pet. App. 4, pp. 3-4); and (3) that some of the documents requested were covered by the attorney-client privilege or were trial preparation materials (Pet. App. 4, pp. 4-7). As in its response to the request for production of documents, CUMIS maintained its objections in a wholesale fashion to virtually every request.

GECU filed a reply memorandum which sought to address CUMIS' objections to each request, insofar as GECU could determine which objection was made with respect to each request (Resp. App. 49a). GECU asserted that requests 2-16 and 29-31 requested documents relating to the intent, meaning, interpretation and construction of specific provisions of the insurance policies in question which CUMIS had placed at issue in its declaratory judgment action (Resp. App. 50a), and that requests 29-31 related to GECU's counterclaim, particularly Counts II-V which alleged that CUMIS had engaged in unfair and deceptive practices generally in the manner in which it dealt with the insureds who are defendants in this litigation, as well as in other situations (Resp. App. 51a). Therefore:

Requests 2-16 and 29-31 describe documents which will tend to show the manner and thoroughness of CUMIS' investigation of claims, whether CUMIS sought or followed the advice of adjustors and attorneys in paying or denying claims, the reasons for CUMIS' acceptance or denial of claims, and other matters concerning CUMIS' claims settlement prac-

tices, all of which are directly relevant to this litigation. Since CUMIS insures over 21,000 credit unions in the United States, many of them in the State of Texas, it would be unreasonable to require GECU to develop evidence of CUMIS' practices in other cases from the many credit unions CUMIS insures, when that information is directly relevant to this case and readily available from CUMIS' own files.

(Resp. App. 51a). GECU in its reply memorandum also noted that CUMIS had not produced documents to which it apparently no longer maintained an objection (Resp. App. 55a), emphasized that GECU did not seek documents legitimately covered by the attorney-client privilege or the work product doctrine, but rather reiterated its request that documents withheld on those grounds be objected to with specificity (Resp. App. 52a), and rejected CUMIS' argument that every document reflecting evaluation or analysis of a claim against CUMIS constituted trial preparation materials (Resp. App. 52a). Finally, GECU argued that the nature and complexity of the litigation, including GECU's claim for treble damages based on CUMIS' unlawful settlement practices, as well as the fact that GECU's claim involved well over \$2,000,000, outweighed the alleged burden of production (Resp. App. 56a). GECU noted that it had made a good faith effort to compromise with CUMIS by agreeing to production of the documents at CUMIS' corporate headquarters in Wisconsin and by offering to narrow the requests based on GECU's present understanding of CUMIS' position in the litigation, desiring only leave to renew the requests should facts developed later indicate a necessity for doing so (Resp. App. 56a).

On August 4, 1982, the district court ordered that production of documents by both parties commence immediately (Pet. App. 4). GECU notified CUMIS by telephone and by mail that GECU was prepared to comply promptly with the judge's order and requested information as to when CUMIS' documents would be available (Resp. App. 69a). Having been informed by CUMIS' counsel for almost a month that CUMIS had not yet determined what response it would make to the

district court's order, GECU filed its first motion for sanctions against CUMIS on September 1, 1982 (Resp. App. 62a).

On September 9, 1982, over a month after the district court's order compelling production, CUMIS' lead counsel, James A. Knox, wrote a letter to the district court apparently in response to GECU's Motion for Sanctions (Resp. App. 93a). In that letter, Mr. Knox announced CUMIS' intention to file a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit to overturn the August 4 order compelling discovery. Mr. Knox also stated, "in the event CUMIS' petition for Mandamus is denied, CUMIS will fully comply with Judge Garcia's discovery order." (Resp. App. 93a).

On September 22, 1982, the district court entered a further order in the referenced matter which provided: (1) that confidential documents shall not be used or discussed in any but the pending action; (2) that documents deemed privileged by either party be submitted to the court *in camera* for determination of the validity of the privilege; (3) that documents determined by the court to be protected from disclosure shall not be disclosed; (4) that the discovery deadline be extended to January 21, 1983; and (5) that the pre-trial order deadline be extended to March 21, 1983 (Pet. App. 7).

CUMIS filed its petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit on September 14, 1982, including an affidavit by William J. Lauerman, CUMIS' Manager of bond and corporate claims, which had never been provided to the district court (Pet. App. 6). GECU filed a response to the petition on behalf of the district court judge on September 27, 1982, and CUMIS filed a reply brief on or about September 28, 1982. The petition was summarily denied without opinion on October 1, 1982 (Pet. App. 8).

Subsequent to the denial of CUMIS' petition for writ of mandamus, the following events have occurred in the district court:

Having been informed by CUMIS' counsel that CUMIS could not begin production of the documents requested by

GECU until November 15, 1982, because of the necessity of CUMIS' staff to review them all, and because CUMIS' staff was too busy to review them immediately, GECU filed its Second Motion for Sanctions on October 19, 1982 (Resp. App. 73a). The thrust of the motion was that a further delay in production of one and one-half months was unreasonable in light of the many months which had already elapsed and the impending discovery deadline. GECU noted that CUMIS had at that point not even begun to prepare the documents for production and that its refusal to do so violated the district court's orders.

On November 3, 1982, the parties conferred by telephone with Mark Dietz, the district court judge's clerk, who encouraged greater cooperation with respect to production. CUMIS' counsel informed Mr. Dietz and counsel for GECU that CUMIS would begin production on November 15, 1982, but would only produce claims files involving investment losses, contrary to its previous commitment that it would "fully comply" with the district court's discovery orders after denial of its writ petition by the court of appeals. Counsel for GECU were encouraged by Mr. Dietz to travel to Madison, Wisconsin, to review those documents (Resp. App. 94a).

On November 15, 1982, two attorneys and two legal assistants arrived in Madison to review documents on behalf of GECU. All of the promised files were not produced and, indeed, neither CUMIS' in-house nor CUMIS' outside counsel continued to review the promised files in order to be able to produce them. GECU's counsel were informed that CUMIS had no present plans to review or produce any files other than the investment loss files—approximately 2% of those allegedly responsive to GECU's document request—and would not disrupt its business in any way to produce more quickly unless severe sanctions were imposed by the district court (Resp. App. 91a). GECU served its Third Motion for Sanctions on December 3, 1982 (Resp. App. 87a). The motion was briefed and argued by GECU and CUMIS.

During the long history of this proceeding in the district court, CUMIS has not moved for a rehearing or a stay of the

district court's orders compelling production, nor did CUMIS move for a protective order until December 23, 1982, when imposition of sanctions by the district court was imminent. Similarly, although CUMIS argues for the first time in this Court that the documents requested by GECU are relevant only to claims by GECU which do not state a claim upon which relief can be granted, CUMIS never moved to dismiss those claims until December 23, 1982, after its petition for certiorari was forwarded to this Court.

SUMMARY OF THE ARGUMENT

This Court should not grant a writ of certiorari in a factually complex and procedurally unusual case which is of importance only to the immediate parties. The only question ostensibly offered by CUMIS in this case is that the district court's orders compelling the production of documents raise significant questions concerning discovery abuse. For two important reasons, this case does not present an appropriate opportunity for the Court to review the question of discovery abuse. First, this complex action involves many parties and raises numerous issues under Texas statutory and common law, indicating that a decision on the merits would have applicability only to the litigants in this case. Second, CUMIS has come to this Court having blatantly disregarded the customary procedures and mechanisms for obtaining the relief it now seeks. For the first time in this Court, CUMIS provides information and raises issues not presented in either the district court or the circuit court. Thus, these highly unusual circumstances render this case wholly inappropriate for this Court's review.

This Court also should deny the writ of mandamus because it improperly seeks interlocutory review of the district court's discretionary decision to compel production of relevant documents. Mandamus is an extraordinary remedy rarely invoked under any circumstances and particularly inappropriate in cases involving interlocutory discretionary decisions of a trial court. Having weighed the burden of production against the need for the requested documents in light of the arguments advanced by

both parties, the district court properly exercised its broad discretion in ordering the production of documents. Moreover, the district court correctly determined that the documents requested by GECU are relevant to the subject matter of this complex case. A unanimous court of appeals therefore properly concluded that a writ of mandamus should not issue, and this Court also should deny the writ.

REASONS FOR DENYING THE WRIT

I. The Unique and Complex Factual Situation Presented in This Case Does Not Raise Important Questions Concerning Discovery Abuse Which Warrant Review by This Court.

Rule 17 of the rules of this Court emphasize that certiorari is granted only when "there are special and important reasons therefor," including conflicting decisions in the courts of appeals on the same subject matter, the presence of important undecided questions of federal law, or a decision conflicting with applicable decisions of this Court. Sup. Ct. R. 17. The instant case presents no such reasons meriting the attention of this Court.

The only question ostensibly presented by CUMIS' petition for writ of certiorari is that the discovery abuse allegedly evidenced by the district court's August 4, 1982 and September 22, 1982 orders compelling discovery rises to the level of an important undecided question of federal law. Although it is unquestionable that discovery abuse is and should be of concern to all participants in litigation in the federal courts, the instant case is not an appropriate vehicle for addressing the question of discovery abuse for several reasons.

First, the manner in which this case has reached this Court reflects at best a wholesale disregard for the customary procedures and mechanisms by which CUMIS could have sought the protection it now seeks in this Court. When GECU served the request for production of documents which is now at issue,

CUMIS did not move for a protective order. It objected to production of the requested documents in only the most general terms, refused to cooperate with GECU when compromise was offered, and, even in response to GECU's motion to compel production, provided the district court with no basis for determining that CUMIS should not be required to produce the requested documents (Pet. App. 4). Indeed, the data which CUMIS now includes in its Question Presented in this Court was never provided to the district court, nor was *any* information concerning the volume of documents responsive to GECU's request, the manner in which those documents were stored or could be retrieved, or the location of those documents. Much of the information upon which CUMIS now relies in support of its petition in this Court surfaced for the first time in an affidavit when CUMIS filed its petition for writ of mandamus in the court of appeals.²

Given CUMIS's failure in the district court to substantiate its objections to production of the requested documents, there is no justification for the fact that CUMIS then took the extraordinary measure of filing a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, without moving for a rehearing, without moving for a stay, without moving for a protective order, and without in any way presenting to the district court that information on which it now relies. The only abuse evidenced by this unusual behavior is CUMIS's own abuse of the customary procedures and mechanisms for obtaining the relief it now seeks. Its attempt to circumvent the district court was rejected by the Court of Appeals for the Fifth Circuit and should be rejected by this Court.

Furthermore, by its misleading abridgment of the facts in its petition in this Court, CUMIS attempts to convince this Court that this is a simple declaratory judgment action by an

² For example, CUMIS never provided the district court with an estimate of the volume of documents, and never told the district court that many of the documents were located in Pomona, California, despite the fact that CUMIS objected to production in Austin, Texas, where it had filed suit, stating that production should be at its Madison, Wisconsin, office (Pet. App. 2, pp. 1, 3), and despite the fact that GECU offered to review the documents in Wisconsin (Resp. App. 56a and 60a).

insurer which has resulted in discovery abuse. For example, CUMIS argues that the question in this case is "whether an insured can properly require under Rule 26(b) an insurer to produce virtually every document it possesses which may, in any manner, 'relate to or refer to' a particular insurance policy in a suit by the insurer for a declaratory judgment as to the scope of coverage afforded by the policy." (Petition for a Writ of Certiorari, p. 7). However, GECU has not requested every document which relates to or refers to the insurance in question, but instead seeks documents relating to specific provisions of the insurance policies placed in issue by CUMIS in this action and to CUMIS' investigation and settlement practices. Moreover, CUMIS tries to conceal the complex and unique facts and issues in this litigation by ignoring the fact that this litigation involves fifteen parties (fourteen of whom are defendants in the suit filed by CUMIS), each of whom has filed counterclaims and crossclaims against the other, some of which may result in damages against CUMIS exceeding \$6,000,000.00. The presence of such factors demonstrates the inappropriateness of reviewing the merits of a motion to compel discovery on writ of certiorari.

CUMIS also argues that it should not be required to produce the requested documents because they are relevant only to certain counts of GECU's counterclaim which CUMIS asserts fail to state a cause of action under Texas law, an argument which CUMIS makes for the first time in this Court. Review of this issue on certiorari is inappropriate, first, because CUMIS never alleged in the district court or the circuit court that the counterclaim failed to state a cause of action, and never moved to dismiss the counterclaim.³ Furthermore, for this Court to decide the question of relevance raised by CUMIS would require the Court to first decide the merits of CUMIS' contention that the counterclaim fails to state a cause of action, a narrow question of state law never presented to the courts below and not sufficiently important to justify a writ of certiorari.

³ CUMIS finally filed a motion to dismiss parts of the counterclaim on December 23, 1982, almost a year after the documents were requested, in a transparent attempt to lend credence to its petition in this Court and avoid the imposition of sanctions in the district court.

Moreover, CUMIS' petition for a writ of certiorari should be denied to avoid rewarding circumvention of the procedures and mechanisms of the federal courts. CUMIS' approach to the motion to compel discovery in the district court was, at best, lackadaisical. Recognizing that the district court could not have ruled in its favor based on the information before it, CUMIS nonetheless petitioned the court of appeals for an extraordinary writ, basing its petition on facts not even presented to the district court. The court of appeals having properly refused CUMIS' invitation to circumvent the district court, CUMIS now comes to this Court, advancing facts and arguments never presented below. To grant CUMIS' petition here would be to invite such petitions, both in the courts of appeals and this Court, by every party aggrieved by a discovery order, further burdening federal courts already overburdened with litigation, and further increasing costs of litigation which already deter litigants from seeking justice through the courts.

Thus, no issue meriting the attention of this Court is presented by this case. The underlying litigation is unusual and the manner in which the issue of production of documents has reached this Court is both improper and unique, precluding a decision by this Court from having applicability to anyone other than the immediate parties. The petition for a writ of certiorari should be denied.

II. The Petition for Writ of Mandamus was Properly Denied by the Court of Appeals and Should be Denied by This Court Because it Improperly Seeks Interlocutory Review of the District Court's Discretionary Decision to Compel Production of Relevant Documents.

Because CUMIS alternatively seeks a writ of mandamus from this Court, it is necessary to address the merits of the district court's orders compelling production of the documents requested by GECU. It is immediately apparent that CUMIS has stated neither legal theories nor a factual basis for such an extraordinary request.

In its petition, CUMIS seeks relief from an order compelling production of documents in a civil case and must demonstrate that mandamus is necessary "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). *Accord, Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Furthermore, CUMIS must show that its right to the extraordinary writ is "clear and indisputable," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 384, and the fact that an order sought to be reviewed through the vehicle of a writ of mandamus involves the exercise of discretion by the trial judge indicates that a petitioner for the writ has an almost impossible burden in trying to demonstrate entitlement to the writ. Indeed, "(w)here a matter is committed to discretion, it *cannot* be said that a litigant's right to a particular result is 'clear and indisputable'." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36 (emphasis added), quoting *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 666 (1978), where Justice Rehnquist also stated:

Although in at least one instance we approved the issuance of the writ upon a mere showing of abuse of discretion, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957), we warned soon thereafter against the dangers of such a practice. "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-appealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n.6 (1967).

Id. at 665 n.7. Moreover, this Court has recognized that to ground mandamus decisions on the "abuse of discretion" argument would threaten the fundamental structure of the federal courts by opening appellate courts to interlocutory review of non-final orders in cases, such as the instant one, which at best present the possibility of error. As stated in

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-83 (1953):

If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction.

Thus, in a matter necessarily involving the exercise of discretion by the trial judge, an appellate court reviewing the resultant decision by way of mandamus should at most determine whether the trial court considered the proper criteria in reaching its decision and cannot substitute its discretion for that of the trial judge. *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964). Cf. *United States v. Sam Goody, Inc.*, 675 F.2d 17, 25-27 (2d Cir. 1982).

Applying the foregoing principles to the instant case, it is obvious that the district court properly exercised its broad discretion in determining whether production of requested documents is unduly burdensome in light of the requesting party's need. CUMIS argued that the magnitude of the burden of production outweighed GECU's need for the requested documents in light of what CUMIS perceived to be their "marginal relevance", although CUMIS did not provide the court below with any facts from which that court could have evaluated the alleged magnitude of that burden. (Pet. App. 2 and Pet. App. 4). GECU demonstrated the relevance of the requested documents (Resp. App. 45a and 50a), and further argued that production should be required, despite the alleged burden on CUMIS, because of the magnitude and complexity of the issues in the case (Resp. App. 43a and 56a). GECU offered to inspect the documents at CUMIS' corporate headquarters in Wisconsin, rather than in Austin, Texas, where CUMIS instigated this action, in order that CUMIS might be

spared the expense of copying and transporting the documents. (Resp. App. 46a, 56a, and 60a).⁴ The trial judge, weighing the arguments of both parties, acted wholly within the proper exercise of his discretion when he ordered CUMIS to produce the requested documents.

There is no suggestion in this case, even by CUMIS, that the trial judge refused to exercise his discretion where he had a duty to do so, or even that he failed or refused to consider the factors he was required to consider in the exercise of his discretion. Indeed, in the absence of a written opinion by the trial court, it cannot be assumed that the court ignored the arguments of counsel and relied on unarticulated impermissible bases for its decision. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36 n.3 (not having a transcript of the district court's oral order granting a new trial, "it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion.").

Thus, CUMIS can argue at most that the decision was wrong. Were it sufficient to argue error on the part of a trial judge in order to obtain a writ of mandamus, interlocutory review of every discovery order would be possible, and the congressional policy against piecemeal review would be abrogated. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. at 36; *Kerr v. United States District Court*, 426 U.S. at 403; *Will v. United States*, 389 U.S. at 98. The district court's decision concerning burdensomeness and relevance, matters uniquely within the discretionary power of the district court, was patently within the proper exercise of its discretion.

Even if mandamus were a proper vehicle for interlocutory review of the trial court's decision on burdensomeness and relevance, mandamus should be denied, because the trial court correctly ordered CUMIS to produce the requested documents. In reaching this conclusion, it is important to examine the factors which were presented for the trial court's consideration

⁴ CUMIS has now stated that some 20% of the requested documents are located in Pomona, California (Pet. App. 6, p. 2). This information was withheld from the district court.

and in light of which a decision was made. CUMIS' brief in opposition to GECU's motion, insofar as it related to burdensomeness, consisted of one paragraph in which CUMIS baldly asserted that the requests were burdensome. (Pet. App. 4, pp. 2-3). CUMIS did not provide the court with even so much as the estimate of the volume of documents which it deceptively provides this Court in its Question Presented. Clearly, CUMIS failed to provide the trial court with *any* factual basis for determining that GECU's requests should be denied on the basis of burdensomeness to CUMIS.

Even in light of the information provided by CUMIS for the first time in the court of appeals, by affidavit of William J. Lauerman (Pet. App. 6), it is plain that the trial court's decision with regard to burdensomeness was correct. Although Lauerman's affidavit provides an estimate of the total number of claim and litigation files in CUMIS' possession, GECU did not ask for all the claim and litigation files in CUMIS' possession. CUMIS' repeated assertions to the contrary are simply false. GECU asked for documents relating to the specific provisions of the insurance policy which are at issue in this case and to CUMIS' investigation and settlement practices. Just as it was impossible for the trial court and the circuit court to even assess the magnitude of the burden asserted by CUMIS, much less to determine that the burden outweighed the factors justifying production, this Court cannot reach such a conclusion.

Finally, even if it is true that the documents requested by GECU contain thousands of pages, the burden of producing those documents must be weighed against the nature, magnitude and complexity of the case. As GECU pointed out in the court below:

It must be remembered that CUMIS itself instigated this litigation against its own insureds, before it had even denied coverage of the claim. Well over \$2,000,000 is involved in GECU's primary claim, and a claim for treble damages has been pled in good faith. The issues involved are numerous and complex. CUMIS has chosen to litigate those issues, having refused to even negotiate a settlement of

GECU's claim, and should not now be heard to complain that the litigation is burdensome.

(Resp. App. 56a). CUMIS is no doubt correct when it asserts than an insurer would be effectively denied access to the courts if every insurer must in every case produce all of its files to the insured, but the converse of CUMIS' argument is that an insured could never enforce legitimate claims against its insurer if that insurer could always be protected from producing the evidence in its own files. Furthermore, GECU has not requested all of CUMIS' files and this is not a typical insured-insurer dispute. The complaint by CUMIS and the counter-claim by GECU alone raise numerous causes of action, and counterclaims and cross-claims between and among all other parties have been filed. The decision of the trial court that the requests for production were not unduly burdensome under the circumstances of this case was thus correct.

Similarly, the decision of the trial court that the requested documents are relevant within the broad meaning of Rule 26(b)(1) of the Federal Rules of Civil Procedure was correct. In the district court, GECU pointed out the relevance of the requested documents to its case in chief as well as for other purposes. (Resp. App. 45a and 50a). CUMIS argued in both the district court and the circuit court that documents relating to CUMIS' handling of similar claims and its prior interpretations of identical policy provisions are not relevant. In this Court, CUMIS apparently admits the relevance of those documents at least to GECU's counterclaim, but now argues that some of GECU's claims fail to state a cause of action. However, those claims have not been dismissed, should not be dismissed, and indeed CUMIS did not even move to dismiss them until after it forwarded its petition to this Court. The documents requested by GECU are plainly relevant to the subject matter of the declaratory judgment action, of GECU's case in chief, and to other counterclaims and cross-claims, as well as relating to the credibility of witnesses and therefore being useful for cross-examination and/or impeachment of deponents and witnesses. In short, the trial court correctly determined that CUMIS' objections on the grounds of relevance should be overruled.

The fact that CUMIS failed to take those obvious steps available to it to obtain the protection it now seeks by way of mandamus indicates that issuance of a writ of mandamus is also inappropriate by virtue of the fact that CUMIS had other means of seeking the relief it desired. Under settled law, a petitioner for writ of mandamus must demonstrate that it has no other means of relief before mandamus will issue. *See, e.g., Kerr v. United States District Court*, 426 U.S. at 403; *Roche v. Evaporated Milk Ass'n*, 319 U.S. at 26. The petition for writ of mandamus is particularly to be avoided except in the most extraordinary circumstances, because it has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. at 384-85; *quoted in Kerr v. United States District Court*, 426 U.S. at 402-03. That CUMIS should precipitously seek such a drastic remedy before taking the most rudimentary steps to obtain the relief it seeks at the district court level demonstrates that CUMIS was properly denied relief by way of mandamus in the court of appeals and should be denied relief in this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari or, alternatively, for a Writ of Mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 2, 1983, three copies of the Brief in Opposition to the Petition for a Writ of Certiorari or, Alternatively, Petition for Writ of Mandamus were mailed, with first class postage prepaid, to:

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APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-013

CUMIS INSURANCE SOCIETY, INC.

vs.

**GOVERNMENT EMPLOYEES CREDIT UNION;
CHESTER H. DORMAN; JERRY M. GRAYBILL;
JOHN T. LANCASTER; R.N. TRAPNELL;
BARBARA J. WOOD; J.T. GLASS;
BOONE K. KEMP; O.L. PONDER;
H.H. WILMS; DORIS DEES BOLTON;
JAMES D. BOHN; E.G. VORWERK; and
TEXAS SHARE GUARANTY CREDIT UNION.**

**PLAINTIFF'S FIRST AMENDED COMPLAINT
TO THE HONORABLE JUDGE OF SAID COURT:**

COMES Now CUMIS INSURANCE SOCIETY, INC. ("CUMIS"), Plaintiff in the above-entitled and numbered action, complaining of GOVERNMENT EMPLOYEES CREDIT UNION, CHESTER H. DORMAN, JERRY M. GRAYBILL, JOHN T. LANCASTER, R.N. TRAPNELL, BARBARA J. WOOD, J.T. GLASS, BOONE K. KEMP, O.L. PONDER, H.H. WILMS, DORIS DEES BOLTON; JAMES D. BOHN; E.G. VORWERK; and TEXAS SHARE GUARANTY CREDIT UNION, Defendants and files this its First Amended Complaint asserting as grounds the following:

STATEMENT OF JURISDICTION, VENUE AND SERVICE OF PROCESS

1. This Court has jurisdiction over the subject matter of this action pursuant to Section 1332(a)(1) of the Judicial Code, 28 U.S.C. § 1332(a)(1) because (i) Plaintiff CUMIS is a citizen of the State of Wisconsin, having been incorporated pursuant to the laws of Wisconsin and having its principal place of business in Madison, Wisconsin; (ii) Defendant Government Employees Credit Union ("GECU") is a citizen of the State of Texas being a credit union organized and existing pursuant to the laws of the State of Texas and having its principal place of business in Austin, Travis County, Texas (iii) Defendant Texas Share Guaranty Credit Union ("TSGCU") is a citizen of the State of Texas, being a credit union organized and existing pursuant to the laws of the State of Texas and having its principal place of business in Austin, Travis County, Texas; (iv) E.G. Vorwerk (included in the phrase "Defendant Directors"), an individual, was formerly a director of GECU and is currently a citizen of the State of Maryland, (v) the remaining Defendants (hereinafter, with the exception of Doris Dees Bolton, sometimes referred to as "Defendant Directors") are individuals and citizens of the State of Texas in that each resides in the State of Texas; and (vi) the amount in controversy exceeds the minimum jurisdictional amount, exclusive of interests and costs.

2. Venue is properly had in the Western District of Texas, Austin Division pursuant to 28 U.S.C. §§ 1391(a) and 1393(b) because jurisdiction is founded upon diversity of citizenship and the claims arose in such District and Division.

3. The Defendants may be served as follows:

a. GECU may be served by delivering a copy of the Summons and Complaint to its President, Thomas J. Amiss at 5520 Burnet Road, Austin, Travis County, Texas 78756.

b. Chester H. Dorman may be served by delivering a copy of the Summons and Complaint to him at 4602 Lasso Path, Austin, Travis County, Texas 78745.

- c. Jerry M. Graybill may be served by delivering a copy of the Summons and Complaint to him at 5520 Burnet Road, Austin, Travis County, Texas 78756.
- d. John T. Lancaster may be served by delivering a copy of the Summons and Complaint to him at 7202 Fred Morse, Austin, Travis County, Texas 78723.
- e. R.N. Trapnell may be served by delivering a copy of the Summons and complaint to him at 1506 Larkwood Drive, Austin, Travis County, Texas 78723.
- f. Barbara J. Wood may be served by delivering a copy of the Summons and Complaint to her at 3800 Manorwood Road, Austin, Travis County, Texas 78723.
- g. J.T. Glass may be served by delivering a copy of the Summons and Complaint to him at 1904 Northridge, Austin, Travis County, Texas 78723.
- h. Boone K. Kemp may be served by delivering a copy of the Summons and Complaint to him at 4603 Kiowa Pass, Austin, Travis County, Texas 78745.
- i. O.L. Ponder may be served by delivering a copy of the Summons and Complaint to him at 2407 Lehigh, Austin, Travis County, Texas 78723.
- j. H.H. Wilms may be served by delivering a copy of the Summons and Complaint to him at 5520 Burnet Road, Austin, Travis County, Texas 78756.
- k. Doris Dees Bolton may be served by delivering a copy of the Summons and Complaint to her at 2601 Penny Lane, Austin, Travis County, Texas 78758.
- l. On information and belief, James D. Bohn may be served by delivering a copy of the summons and Complaint to him at his last known address which is 1119 Rultlant, Apartment No. 100, Austin, Travis County, Texas, 78758.
- m. E.G. Vorwerk was formerly employed as a Director of Defendant GECU and resided in the State of Texas at the time the cause of action, which is the basis of

this suit, accrued, but currently resides at 18196 Glendower Road, Gaithersburg, Montgomery County, Maryland, 20760. Having become a nonresident of Texas prior to the filing of the instant lawsuit, E.G. Vorwerk is required to appoint an agent for service in Texas. Therefore, E.G. Vorwerk may be served with process by delivering a copy of the summons and Complaint to the Secretary of State of the State of Texas, which in turn shall forward same to E.G. Vorwerk at the above-identified address.

n. TSGCU may be served by delivering a copy of the summons and Complaint to its President, Burford Lankford, at 400 East Anderson Lane, Austin, Travis County, Texas.

BACKGROUND OF TRANSACTION AND EVENTS GIVING RISE TO CLAIMS FOR RELIEF

4. On or about May 15, 1977, CUMIS issued its standard Credit Union Discovery Bond No. CDB 08059 ("Bond") with Directors and Officers Liability Policy No. X00469-A ("Policy") to GECU. A true and correct copy of such Bond and Policy is attached as Exhibit "A" to the Complaint already on file with this Court. Such Bond and Policy remain in full force and effect as of the date of the filing of this Complaint.

5. The Bond generally provides, among other things, that CUMIS will indemnify GECU for direct loss of property occurring at any time but discovered within the effective Bond period caused by the fraud or dishonesty of any of GECU's employees or through the failure on the part of such employee, excluding directors acting as directors except for fraud or dishonesty, to well and faithfully perform his duties. The Policy provides generally that CUMIS shall pay on behalf of the Directors and Officers of GECU, covered by the Policy, loss arising from any claim made against such Directors and Officers during the policy period by reason of any Wrongful Act, as defined, in their respective capacities of Directors or Officers. The Policy also generally provides that if the Credit Union is required to indemnify the Directors and Officers that such payment shall be made to the Credit Union. On informa-

tion and belief, GECU has no duty to indemnify its Directors and Officers and, therefore, is not covered by the Policy.

6. On or about February 15, 1980, Thomas J. Amiss, acting as President of GECU, by letter to CUMIS stated that as per instructions of the Texas Credit Union Commissioner, GECU was informing CUMIS of "a potential claim for losses resulting from illegal or unauthorized investments."

7. By telephone conversations with Thomas J. Amiss on February 20, 1980, CUMIS learned that the "potential claim" was filed by GECU at the request and insistence of the Texas Credit Union Commissioner and was based on certain alleged losses in regard to investments of GECU, which investments had been handled on behalf of GECU by its former President and manager Doris Dees Bolton ("Bolton"). Pursuant to such oral conversations, CUMIS learned that the Commissioner alleged that Bolton did not have authority to invest as she did. Further, CUMIS was orally advised by Amiss that GECU did not expect any loss would exist and that the notice letter was merely to protect GECU's interest in the event of future loss.

8. On or about March 21, 1980, CUMIS, by letter to Amiss, acknowledged the receipt of the February 15, 1980 notice letter, described above, and further acknowledged that certain materials were received by CUMIS from GECU including a copy of an August 10, 1979, examination report of the Texas Credit Union Department in which the investment activity of Bolton was questioned. By the March 21, 1980 letter, CUMIS informed GECU that: "No action will be taken by the Society on this matter and if there is further need to communicate with this department regarding the subject of your February 15 letter, please make reference to the captioned claim number, B-126460."

9. No further communication in regard to the potential claim was received by CUMIS until after the expiration of five months. By letter to CUMIS dated September 24, 1980 signed by M.R. Carson, Vice-President of GECU, CUMIS was notified, among other things:

A reserve account for Faithfull Performance (Bolton) is no longer necessary. The Texas Commission-

er of Credit Unions required that we put CUMIS on notice that a claim might be filed. We do not intend to file a claim and the Commissioner is no longer requiring us to maintain this reserve.

With this new information, hopefully you will be able to adjust our premium rates.

10. Based on the September 24, 1980 letter described above, and in a belief that GECU did not intend to pursue the "potential claim" in regard to Bolton, CUMIS re-rated the coverages purchased by GECU and reduced the basic premium. By letter of October 7, 1980 from John A. Benedict of CUMIS to M.R. Carlson, Vice-President of GECU, a refund of premiums (due as a result of the re-rating) in the amount of \$681.20 was forwarded to GECU.

11. Six months expired before CUMIS received any further communication in regard to the "potential claim." On May 12, 1981, CUMIS received a letter from one Everette G. Allen, Jr., an attorney from Richmond, Virginia. Such letter purported to give notice under the CUMIS Bond of "losses arising from certain transactions in Government National Mortgage Association securities engaged in by a former employee of GECU, Doris Dees Bolton." The letter enclosed a purported notice and proof of loss in regard to such Bond claim.

12. The May 8, 1981 letter also purported to give notice of a claim under the Directors and Officers Policy. The letter states:

Furthermore, we have been instructed to notify you that a claim has been made against Doris Dees Bolton in her capacity as an officer and director, as well as against other members of the Board of Directors, for the same losses as are enumerated in the Notice and Proof of Claim, based on wrongful acts committed by those directors. Notice of said claim is hereby given in discharge of GECU's responsibility under the Directors and Officers Liability Policy.

13. CUMIS responded to the May 8, 1981 letter by letter to Everette G. Allen, Jr. dated May 20, 1981 which acknowl-

edged receipt of Allen's letter and Notice and Proof of Loss. Pursuant to such May 20, 1981 letter, CUMIS reserved all of its rights and, in particular, its right to assert as defenses the conditions precedent of the Bond and Policy in regard to time requirements for Notice and Proof of Loss.

14. Attached to Allen's letter of May 8, 1981 is an affidavit of Jerry M. Graybill, a director of GECU. Such affidavit claims that Bolton, during 1976 through 1979, engaged in certain investments in Government National Mortgage Association securities. The affidavit states that the Texas Credit Union Commissioner, pursuant to findings dated February 14, 1980, found that the investments were improper. Copies of the February 14, 1980 findings are attached as part of the purported Notice and Proof of Loss. Graybill's affidavit claims that GECU had suffered "market losses" of \$877,339.35 on the investments. Additionally, pursuant to an Order of the Texas Credit Union Commissioner, an additional investment commitment was sold by GECU resulting in a loss of \$121,406.25. The affidavit also claims that GECU incurred \$16,375.00 in lawyer's and accountant's fees in responding to certain actions of the Texas Credit Union Department in his examination of GECU. Apparently, GECU intends to make a claim under the Bond for such amounts.

15. Thereafter, CUMIS learned that prior to the May 8, 1981 letter of Allen to CUMIS, the Board of Directors of GECU met in a Special Meeting on May 7, 1981. In addition to passing a resolution approving the Graybill affidavit, described above, the Directors apparently took the following action as described in the minutes of the May 7, 1981 Special Board Meeting:

Mr. Patton representing the membership, made an oral claim of the charges against the Board and Mrs. Bolton. Mr. Patton will notify by phone Mr. Dorman, Mr. Riley, and Mrs. Bolton of the same charges that are being filed.

Mr. Patton read a letter drawn up by our counsel E.G. Allen Jr., to be signed by the President Mr.

Amiss, charging the Board and Mrs. Bolton with wrongful acts. After much discussion a resolution was unanimously passed to have Mr. Amiss sign the letter as counsel had asked. [sic]

On information and belief, Mr. Patton is an Austin attorney who had been previously hired by the Directors to represent GECU in regard to the actions taken by the Texas Credit Union Commissioner. Although Patton purported to represent the "membership" at the May 7, 1981 meeting, he later purported to represent the Directors against whom he made a claim at the May 7 meeting. On information and belief, the letter read by Patton at the meeting was drafted by Allen, is dated May 8, 1981, addressed to Allen and signed by Amiss in his capacity as the President of GECU. Such letter in part states:

As President of Government Employees Credit Union of Austin, Texas ("GECU"), I have become aware of the circumstances surrounding this credit union's speculative, unsafe and illegal securities transactions during the tenure of the past president, Doris Dees Bolton ("Bolton"). Based on the information which I now have, I have concluded that Bolton and some or all other members of the Board of Directors committed wrongful acts resulting in the loss to GECU of at least \$1,015,121.00, which acts include, without limitation:

1. Bolton caused GECU to engage in stand-by and forward commitments to purchase Government National Mortgage Association securities without the knowledge of and without authorization or approval by the Board of Directors of GECU. These transactions have been found by the Credit Union Commissioner of the State of Texas to be in violation of Section 8.01 of the Texas Credit Union Act.
2. Bolton caused GECU to engage in repurchase agreements and reverse repurchase agreements without the knowledge of and without authorization or approval by the Board of Directors of GECU. These

transactions have been found by the Credit Union Commissioner to be in violation of Section 4.01 (10) of the Texas Credit Union Act.

3. Some or all members of the Board of Directors breached their duty to GECU or were negligent in failing to properly supervise Bolton, failing to inform themselves of the affairs of the credit union in order that they might carry out their duties as members of the Board of Directors; failing to properly exercise the direction and control of the affairs, funds and records of the credit union; failing to properly invest the funds of the credit union and failing to properly account for GNMA transactions.

As a result of these and other wrongful acts, GECU has made claim against all implicated members of the Board of Directors. I instruct you to make a claim against Bolton and to notify CUMIS Insurance Society, Inc. of said claims, on behalf of GECU, pursuant to Section 7(b) of the Directors and Officers Liability Policy.

The letter, signed by Amiss with the approval of the Directors, charges those very Directors with certain wrongful acts. Further, the letter instructs Allen to pursue claims against Bolton under the Bond and against the Directors individually. The Minutes of the Directors' May 7, 1981 meeting describe Allen as "our counsel." Thus, the Directors, by their resolution of May 7, 1981, apparently approved that claims should be made against themselves by an attorney hired by them.

16. Thereafter, by letters of May 13 and 18, 1981 addressed to CUMIS, attorney George Patton forwarded to CUMIS, apparently on behalf of GECU's Directors who had agreed to file claims against themselves, certain "consent to counsel" letters. These so-called "consent to counsel" letters state that the person signing same (the Defendant Directors) have been requested to indemnify GECU in the amount of \$1,015,121.00. The "consent" also states that the Directors intend "to contest such claim" and request that CUMIS give its consent to the hiring of legal counsel to contest the claim. Thus,

the Defendant Directors who passed a resolution on May 7, 1981 to pursue a claim against themselves for their own "wrongful acts" gave notice to CUMIS a few days thereafter that they intended to contest such claim. Further, the so-called "consent" was forwarded on behalf of the Defendant Directors to CUMIS by attorney Patton who purportedly represented the "membership" of GECU in making the claim against the Directors.

17. CUMIS would show that attorneys Patton and Allen purported to represent and have represented both GECU, the entity claiming against the Directors as well as the Directors in their individual capacity.

18. CUMIS responded to Patton's May 13 and 18, 1981 letters by letter of June 8, 1981 denying the request that CUMIS retain legal counsel for the directors by stating that the Policy did not require CUMIS to do so.

19. Thereafter, at the request of attorney Allen, CUMIS extended the time for filing suit under the Bond.

20. TSGCU has become the conservator of GECU.

21. On or about January 29, 1982, some seventeen (17) days after the instant action was filed, GECU and TSGCU filed a lawsuit in State Court in Travis County, Texas, against Defendant Directors and Doris Bolton, alleging that: (i) Defendant Bolton was negligent and breached her fiduciary duties to GECU by entering into GNMA transactions without the knowledge of or consent of the Board of Directors of GECU, and (ii) Defendant Directors breached their duties to GECU in failing to properly supervise the financial affairs of GECU. GECU and TSGCU also brought a federal court action against E.G. Vorwerk, asserting issues and causes of action which will be fully and fairly adjudicated in the instant action. The claims asserted in such actions have been asserted in this action by way of cross-claim.

COUNT ONE

22. The allegations and averments set forth in Paragraphs 1 through 19 are realleged and incorporated in this Count One by reference.

23. CUMIS would show that the investments made the subject of the Plaintiff's claim under the Bond were made with authority of the Board and were otherwise proper. Consequently, the making of the investments does not constitute a failure on the part of Bolton to well and faithfully perform her duties.

24. Nevertheless, any loss incurred by GECU, if any, is merely a loss in the value of an investment due to deterioration in market conditions. Such loss, if any, is not recoverable under the Bond nor can it be said to be a direct loss caused by the failure of Bolton to well and faithfully perform her duties.

25. Based on the foregoing, and pursuant to 28 U.S.C. § 2201, CUMIS is entitled to and hereby requests this Honorable Court to render judgment declaring that the claim asserted by GECU under the Bond is not recoverable in that same is not a direct loss of property caused by the failure of an employee to well and faithfully perform her duties. To the extent TSGCU has an interest in such Bond claim, which CUMIS denies, CUMIS seeks similar relief as to TSGCU.

COUNT TWO

26. The allegations and averments set forth in Paragraphs 1 through 23 are realleged and incorporated in this Count Two by reference.

27. The Bond in question provides in general that CUMIS will indemnify GECU for certain losses which happen at any time, but which are discovered within the effective Bond period. Thus, the triggering event of coverage under the Bond is the discovery of loss.

28. The Bond provides that the insured, GECU, must give written notice of loss as soon as possible after the insured shall learn of such loss and not less than twenty (20) days thereafter. If the insured's failure to give notice within twenty (20) days does not prejudice CUMIS, then notice is required within reasonable time after the insured learns of the loss. Further, the

Bond requires that itemized proof of loss duly sworn to must be filed with CUMIS within 120 days after giving notice. (See Bond, General Conditions § 2.) CUMIS would show that such provisions are enforceable and valid conditions precedent to recovery under the Bond.

29. CUMIS would show that GECU failed to comply with such conditions precedent under the Bond. In particular, the purported notice of February 15, 1980 was given after the expiration of a reasonable time after GECU learned of its loss, if any. CUMIS would show that the loss, if any, was discovered on or about August, 1979, when the Credit Union Commissioner issued his Department's Examination Report. In any event, such "claim" was withdrawn by GECU on or about September 24, 1980. Thus, the February, 1980 notice, voluntarily withdrawn by GECU does not provide a basis for compliance with the notice requirements under the Bond.

30. Thereafter, CUMIS sought to re-assert the same claim pursuant to the May 8, 1981 letter of Allen. Such notice and proof of loss were untimely. Notice was not given within a reasonable time and proof of loss was not filed within 120 days thereafter. Further, although not necessary as part of a late notice and proof of loss defense, the lateness of such notice resulted in prejudice to CUMIS as it has re-rated GECU's coverages and returned premiums to GECU based upon the earlier withdrawal of the claim.

31. Based on the foregoing, and pursuant to 28 U.S.C. § 2201, CUMIS is entitled to and hereby requests this Honorable Court to render Judgment declaring that the claim asserted by GECU under the Bond is not recoverable thereunder due to the failure of GECU to properly comply with the notice and proof of loss conditions precedent thereof. To the extent TSGCU has an interest in such Bond claim, which CUMIS denies, CUMIS seeks similar relief as to TSGCU.

COUNT THREE

32. The allegations and averments set forth in Paragraphs 1 through 29 are realleged and incorporated in this Count Three by reference.

33. The Defendant Directors in their capacity as Directors have passed a resolution that GECU should make a claim against them, in their individual capacities, for their alleged failure to perform properly their duties as Directors in connection with the purported investment loss for which a claim has been filed under the Bond. CUMIS would show that the sole purpose of such action is an attempt by the Directors to create coverage under the Directors & Officers Policy for the purported investment losses when no such coverage was intended to be provided thereunder. The attempt of the Defendant Directors to extend the Policy coverage on behalf of GECU as a source of reimbursement for investment losses is improper. Such Policy is clearly intended to cover third party claims and not claims created by the Directors against themselves.

34. CUMIS would further show that the Defendant Directors, in agreeing to create a claim against themselves, were motivated by an intent to create insurance coverage under the Policy for an uninsured and uninsurable loss—an investment loss. The Defendant Directors, by approving the claim against themselves, are not intending to create their personal liability to GECU, but instead are hopeful that CUMIS will offer some sum in settlement of the purported claim even though same is not within the scope of the Policy. It should be emphasized that no action lies against CUMIS under the Policy unless and until the Directors' obligation to pay is determined by judgment (unless CUMIS otherwise agrees). As evidence of the improper motivation of the Defendant Directors is the inconsistency of their position. On May 7, 1982, the Directors approved a letter to be signed by GECU's President Amiss charging them with wrongdoing. By May 13, 1981, the Defendant Directors notified CUMIS that they intended to contest the claim of wrongdoing. Such inconsistency makes it clear that the Defendant Directors' action was taken solely in an attempt to create insurance coverage where none is provided in the Policy. Such action is against public policy.

35. The Policy provisions indicate clearly that it was never intended to cover claims created by the Directors against themselves. The Policy provides at §7(e):

The Credit Union and the Insured [including the Defendant Directors] shall give the Society such information and cooperation as they may reasonably require and"

The quoted provision, commonly called the cooperation clause, emphasizes that the Policy was not intended to cover a claim by GECU against its Directors. GECU, under the claim created by the Directors, will be the entity claiming against the Directors. Thus, if the claim in question is recognized as valid, the Policy would require the entity making a claim against the Directors to cooperate with CUMIS in the defense of the Directors. Such result was never intended and indicates the impropriety of the Defendant Directors' action. Further, the Defendant Directors themselves have a duty to cooperate. CUMIS would show that such duty has already been materially breached by the Directors' action in causing the claim to be made against themselves. The Defendant Directors have been unwilling to discuss fully the claim with CUMIS and its agents and have generally been uncooperative. Hence, the application of the cooperation clause indicates that the claim created by the Directors was never intended to be within the scope of the Policy. Further, the Directors' refusal to cooperate amounts to a material breach of the Policy, precluding coverage thereunder in behalf of the Defendant Directors.

36. Further, the claim created by the Defendant Directors against themselves would necessarily involve a lawsuit by GECU, as plaintiff, and the Defendant Directors, as defendants. It is clear that as Directors of GECU, the Defendant Directors would control the actions taken by GECU. Any lawsuit by GECU against the Defendant Directors under such circumstances would be collusive. Such collusive lawsuits are against public policy.

37. The notice requirements of the Policy also evidence the intent that the Policy is not designed to cover the claim created by the Directors. As a condition precedent to the Defendant

Directors' right to indemnification under the policy, they must give notice to CUMIS as provided in §7(b) of the Policy after any claims are made upon them. Such provisions clearly evidence the intent that the Policy is drafted to cover only *third party* claims against the Directors. The provisions are meaningless when applied to the purported claim of the Directors against themselves in that the Defendant Directors create the very event (i.e. a "claim made") which triggers their obligation to give notice. In any event, the Defendant Directors have failed to properly comply with the notice conditions precedent and are, thereby, precluded from recovery under the Bond.

38. § 7(c) of the Policy further indicates that the Policy is not intended to cover claims made by the Defendant Directors against themselves. § 7(c) describes the type of claims intended to be within the policy period. § 7(c) provides:

(c) If during the policy period:

(i) the Credit Union or the Insured shall receive written or oral notice from any third party that it is the intention of such third party to hold the Insureds responsible for the results of any specified Wrongful Act by the Insureds while acting in the capacities aforementioned; or

(ii) the Credit Union or the Insureds shall first become aware of any occurrence which may subsequently give rise to a claim being made against the Insureds in respect of any such Wrongful Act;

and shall in either case during such policy period give written notice to the Society of the receipt of such written or oral notice under (i) above or such occurrence under (ii) above, then any claim which is subsequently made against the Insureds arising out of such Wrongful Act shall for the purpose of this Policy be treated as a claim made within the period of this Policy.

Such provision describes two situations relevant to the Bond: (a) § 7(c)(i) refers to receipt of notice from a *third party* that such third party intends to make a claim; and (b) §7(c)(ii) refers to the insureds becoming aware of occurrences which

may give rise to a claim being made. §7(c)(i) is clearly limited to third party claims. §7(c)(ii) would be meaningless if it was interpreted to relate to anything other than occurrences giving rise to third party claims. It is illogical to speak in terms of the directors learning of an occurrence which may be the basis of a claim if they are also the persons who will be making the claim. The Policy is clearly not intended to cover the purported claim made by the Directors against themselves.

39. The Policy also provides:

... provided always that such subject of loss shall not include fines or penalties imposed by law or other matters which may be *deemed uninsurable* under the law pursuant to which this Policy shall be construed.
(emphasis added)

CUMIS would show that claims created by the directors against themselves are not insurable as a matter of public policy. Further, CUMIS would show that investment losses are not in any event insurable.

40. Based on the foregoing allegations and the Policy provisions quoted above and pursuant to 28 U.S.C. §2201, Plaintiff is entitled to and hereby requests this Honorable Court to render a Judgment declaring that the purported claim made by the Defendant Directors on behalf of GECU against themselves is against public policy; that such claim is not the type or nature of claim intended to be within the scope of coverage of the Policy; and that the Defendant Directors and GECU have materially breached the Policy by failing to cooperate such that CUMIS has no duty or obligation to the Defendant Directors under the Policy in regard to such claim.

WHEREFORE, CUMIS respectfully prays for Judgment against the Defendants granting the relief requested in Paragraphs 25, 31 and 40, and for such other and further relief to which Plaintiffs may be justly entitled and for which they shall ever pray.

Respectfully submitted,

By: /s/ JAMES A. KNOX

James A. Knox
State Bar No. 11630000

By: /s/ STEPHEN L. BASKIND

Stephen L. Baskind
State Bar No. 01875600

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and

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(512) 478-1657

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing has been forwarded via United States Postal Service, Certified Mail, Return Receipt Requested to:

Mr. Everette G. Allen, Jr.
Ms. Linda Royster
Hirschler, Fleischer, Weinberg,
Cox & Allen
Post Office Box 1Q
629 East Main Street
Richmond, Virginia 23202

Mr. Lloyd Lochridge
Mr. James R. Raup
McGinnis, Lochridge, Kilgore
Texas State Bank Building
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Austin, Texas 78701

Mr. John C. Wilson
Wilson & Grosenheider
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Mr. Jerry Nugent
Rinehart & Nugent
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221 West Sixth Street
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Mr. Thomas Watkins
Hilgers, Watkins & Kazen, P.C.
Post Office Box 2063
City National Bank Building
Austin, Texas 78768

Mr. Robert C. Howell
711 West Seventh Street
Austin, Texas 78701

Mr. Glen Wilkerson
Mr. John Coates
Clark, Thomas, Winters & Shapiro
1200 Capital National Bank Bldg.
Post Office Box 1148
Austin, Texas 78767

on this 3rd day of August, 1982.

/s/ STEPHEN L. BASKIND

Stephen L. Baskind

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,

Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,

Defendants.

**GOVERNMENT EMPLOYEES CREDIT UNION'S
ANSWER TO PLAINTIFF'S FIRST
AMENDED COMPLAINT**

GOVERNMENT EMPLOYEES CREDIT UNION ("GECU"), answers the Plaintiff's First Amended Complaint (referred to in this Answer as "Amended Complaint") as follows:

1. GECU admits the allegations of subsections (i), (ii), (iii), (v), and (vi) of paragraph 1 of the Amended Complaint. GECU lacks information sufficient to admit or deny the allegations of subsection (iv) of paragraph 1 of the Amended Complaint, except that GECU denies that E. G. Vorwerk ("Vorwerk") is properly included in the phrase "Defendant Directors" as that term is used in the Amended Complaint and denies all allegations of the Amended Complaint which refer to Vorwerk by inclusion in the term "Directors" or the phrase "Defendant Directors."

2. GECU admits the allegations of paragraph 2 of the Amended Complaint.

3. GECU admits the allegations of subsections b., c., d., e., f., g., h., i. and l. of paragraph 3 of the Amended Complaint. GECU denies the allegations of subsections a., j., and k. of paragraph 3 of the Amended Complaint. With respect to subsection m. of the Amended Complaint, GECU denies that Vorwerk was formerly employed by GECU; GECU lacks information sufficient to admit or deny the allegation that Vorwerk currently resides at 18196 Glendower Road, Gaithersburg, Montgomery County, Maryland 20760; GECU admits that Vorwerk was formerly a director of GECU, that Vorwerk formerly resided in the State of Texas, and that Vorwerk subsequently resided at the Gaithersburg, Maryland address listed above; GECU denies all other allegations of subsection m. of paragraph 3 of the Amended Complaint. GECU admits the allegations of subsection n. of paragraph 3 of the Amended Complaint, except that GECU avers that the President of Texas Share Guaranty Credit Union ("TSGCU") is named Buford Lankford. GECU denies all allegations of paragraph 3 of the Amended Complaint not specifically admitted herein.

4. GECU admits the allegations of the first sentence of paragraph 4 of the Amended Complaint, except that GECU lacks knowledge sufficient to admit or deny whether such bond is a "standard" bond, and except that the Policy is issued as, and is, an endorsement to the Bond and is an integral part thereof. GECU lacks information sufficient to admit or deny the allegations of the second sentence of paragraph 4 of the Amended Complaint that Exhibit "A" to the Complaint previously filed herein is a true copy of Credit Union Discovery Bond No. CDB 08059 ("Bond"), and its endorsements. GECU admits that the Bond is in full force and effect as of the date of the filing of the Amended Complaint. GECU denies all allegations of paragraph 4 of the Amended Complaint not specifically admitted herein.

5. GECU denies that the allegations of paragraph 5 of the Amended Complaint accurately or completely summarize the terms and conditions of the Bond and Policy as interpreted under applicable law and accordingly denies those allegations.

6. GECU admits that Thomas J. Amiss ("Amiss") wrote to CUMIS by letter dated February 15, 1980. GECU denies all allegations of paragraph 6 of the Amended Complaint not specifically admitted herein.

7. GECU admits the allegations of paragraph 7 of the Amended Complaint insofar as they state that on some date after February 15, 1980, Amiss engaged in a telephone call with an agent or employee of CUMIS, and further admits that Amiss told said agent or employee of CUMIS that the Texas Credit Union Commissioner had ordered GECU to give notice to CUMIS. GECU denies all allegations of paragraph 7 of the Amended Complaint which are not specifically admitted herein.

8. With respect to the allegations of paragraph 8 of the Amended Complaint, GECU admits that CUMIS, by letter dated March 21, 1980: (a) acknowledged receipt of Amiss' February 15, 1980, letter, (b) acknowledged receipt of certain materials from GECU, including a Texas Credit Union examination report dated August 10, 1979, and (c) stated, among other things, "No action will be taken by the Society on this matter and if there is further need to communicate with this department regarding the subject of your February 15 letter, please make reference to the captioned claim number, B-126460." GECU denies all allegations of paragraph 8 of the Amended Complaint which are not specifically admitted herein.

9. GECU admits the allegations of the second sentence of paragraph 9 of the Amended Complaint. GECU denies all allegations of paragraph 9 of the Amended Complaint which are not specifically admitted herein.

10. GECU lacks information sufficient to admit or deny the allegations of paragraph 10 of the Amended Complaint and accordingly denies those allegations.

11. GECU lacks information sufficient to admit or deny the allegations of the first sentence of paragraph 11 of the Amended Complaint, and accordingly denies those allegations. GECU admits the allegations of the second sentence of para-

graph 11 of the Amended Complaint. GECU alleges that the letter from Everette G. Allen, Jr. ("Allen"), and the enclosures therewith, speak for themselves and denies all allegations of paragraph 11 of the Amended Complaint which are inconsistent with those documents. GECU denies all allegations of paragraph 11 of the Amended Complaint which are not specifically admitted herein.

12. GECU admits that the letter from Allen referred to in paragraph 11 of the Amended Complaint was dated May 8, 1981, and contained, among other things, the statement quoted in paragraph 12 of the Amended Complaint. GECU alleges that the letter from Allen, and the enclosures therewith, speak for themselves and denies all allegations of paragraph 12 of the Amended Complaint which are inconsistent with those documents. GECU denies all allegations of paragraph 12 of the Amended Complaint which are not specifically admitted herein.

13. GECU admits that by letter dated May 20, 1981, William J. Lauerman ("Lauerman") of CUMIS acknowledged receipt of Allen's letter. GECU denies all allegations of paragraph 13 of the Amended Complaint which are not specifically admitted herein.

14. GECU admits the allegations of the first sentence of paragraph 14 of the Amended Complaint. GECU denies that the remaining allegations of paragraph 14 of the Amended Complaint accurately or completely summarize the affidavit of Jerry M. Graybill and accordingly denies those allegations. With respect to the last sentence of paragraph 14 of the Amended Complaint, GECU alleges that it properly made and continues to assert a claim under the Bond, which claim is the subject of the Counterclaim herein.

15. With respect to the allegations of paragraph 15 of the Amended Complaint, GECU admits the following: the Board of Directors of GECU met on May 7, 1981; the Board of Directors passed a resolution authorizing Jerry M. Graybill to execute the affidavit referred to in paragraph 14 of the Amended Complaint; paragraph 15 of the Amended Complaint

accurately quotes a portion of the minutes of the May 7, 1981, board meeting; George E. Patton ("Patton") is an attorney retained in or about February 1980 to represent GECU; at the May 7, 1981, meeting of the Board of Directors, Patton read a letter which had been drafted by counsel to GECU; said letter was later signed by Thomas J. Amiss, President of GECU, dated May 8, 1981, and addressed to Allen; the allegations of paragraph 15 of the Amended Complaint accurately quote the body of said letter; Amiss was authorized by the Board of Directors of GECU to sign said letter; said letter speaks for itself. GECU denies all allegations of paragraph 15 of the Amended Complaint which are not specifically admitted herein.

16. With respect to the allegations of paragraph 16 of the Amended Complaint, GECU admits that Patton, by letters dated May 13 and May 18, 1981, forwarded to CUMIS at the request of members of the Board of Directors of GECU, letters signed by certain members of the Board stating that they intended to contest the claim made against them for \$1,015,121.00 and requesting that counsel be provided them. GECU denies all allegations of paragraph 16 of the Amended Complaint which are not specifically admitted herein. GECU's answer to paragraph 1 of the Amended Complaint is hereby incorporated by reference in response to this paragraph 16.

17. GECU denies the allegations of paragraph 17 of the Amended Complaint.

18. GECU admits that CUMIS responded to Patton's letters by Lauerman's letter dated June 8, 1981. GECU denies all allegations of paragraph 18 of the Amended Complaint not specifically admitted herein. GECU's answer to paragraph 1 of the Amended Complaint is hereby incorporated by reference in response to this paragraph 18.

19. GECU admits the allegations of paragraph 19 of the Amended Complaint, insofar as they state that, at Allen's request, CUMIS extended the time for filing suit under GECU's Bond No. CDB 08059 which includes the Policy. GECU denies all other allegations of paragraph 19 of the Amended Complaint.

20. GECU admits the allegations of paragraph 20 of the Amended Complaint.

21. GECU admits that on or about January 29, 1982, GECU and TSGCU filed a lawsuit in the District Court of Travis County, Texas, against Doris D. Bolton, James D. Bohn, Chester Dorman, J. T. Glass, Jerry M. Graybill, Boone E. Kemp, John T. Lancaster, Oliver L. Ponder, Robert N. Trapnell, E. G. Vorwerk, Homer H. Willms and Barbara J. Wood. GECU denies that the allegations of paragraph 21 of the Amended Complaint accurately or completely summarize the allegations of that lawsuit and accordingly denies the allegations of paragraph 21 of the Amended Complaint insofar as that paragraph purports to summarize that lawsuit. GECU further admits that GECU and TSGCU brought an action against E. G. Vorwerk in the United States District Court for the Western District of Texas, Austin Division, on or about January 29, 1982. GECU denies all allegations of paragraph 21 of the Amended Complaint not specifically admitted herein.

22. The allegations of paragraphs 1 through 19 of this Answer are hereby incorporated by reference in response to paragraph 22 of the Amended Complaint.

23. GECU denies the allegations of paragraph 23 of the Amended Complaint and denies that CUMIS is entitled to the relief it seeks or any relief.

24. GECU denies the allegations of paragraph 24 of the Amended Complaint.

25. GECU denies the allegations of paragraph 25 of the Amended Complaint.

26. The allegations of paragraphs 1 through 25 of this Answer are hereby incorporated by reference in response to paragraph 26 of the Amended Complaint.

27. GECU denies that the allegations of paragraph 27 of the Amended Complaint accurately or completely summarize the terms and conditions of the Bond as interpreted under applicable law and accordingly denies those allegations.

28. GECU denies that the allegations of paragraph 28 of the Amended Complaint accurately or completely summarize the terms and conditions of the Bond and Policy as interpreted under applicable law and accordingly denies those allegations. GECU specifically denies that the notice and proof of loss provisions of the Bond are enforceable and valid conditions precedent to recovery under the Bond.

29. GECU denies the allegations of paragraph 29 of the Amended Complaint.

30. GECU denies the allegations of paragraph 30 of the Amended Complaint.

31. GECU denies the allegations of paragraph 31 of the Amended Complaint, and denies that CUMIS is entitled to the relief it seeks or any relief.

32. The allegations of paragraphs 1 through 29 of this Answer are hereby incorporated by reference in response to paragraph 32 of the Amended Complaint.

33. GECU denies the allegations of paragraph 33 of the Amended Complaint.

34. GECU denies the allegations of paragraph 34 of the Amended Complaint.

35. GECU denies the allegations of paragraph 35 of the Amended Complaint, except that GECU admits that a portion of section 7(e) of the Policy is correctly quoted in paragraph 35 of the Amended Complaint.

36. With respect to the allegations of paragraph 36 of the Amended Complaint, GECU admits that a lawsuit against the directors named in the instant action could be and has been brought by GECU as plaintiff against the directors named as defendants in the instant action. GECU denies all other allegations of paragraph 36 of the Amended Complaint.

37. GECU denies the allegations of paragraph 37 of the Amended Complaint.

38. GECU denies the allegations of paragraph 38 of the Amended Complaint, except that GECU admits that section 7(c) of the Policy is correctly quoted, although not correctly paragraphed, in paragraph 38 of the Amended Complaint.

39. GECU denies the allegations of paragraph 39 of the Amended Complaint, except that GECU admits that a portion of section 2(c) of the Policy is correctly quoted, with emphasis added by CUMIS, in paragraph 39 of the Amended Complaint.

40. GECU denies the allegations of paragraph 40 of the Amended Complaint, and denies that CUMIS is entitled to the relief it seeks or to any relief.

41. GECU alleges that:

(a) neither James D. Bohn ("Bohn") nor Vorwerk were members of the Board of Directors of GECU after December, 1979.

(b) neither Vorwerk nor Bohn were present at or took part in the decisions made at the Special Meeting of the Board of Directors of GECU on May 7, 1981, to which reference is made in the Amended Complaint.

(c) neither Vorwerk nor Bohn served on the Board of Directors of GECU when George Patton was retained to represent GECU.

(d) neither Vorwerk nor Bohn served on the Board of Directors of GECU when E. G. Allen, Jr. was retained to represent GECU.

(e) no part of Count Three of the Amended Complaint could possibly be applicable to either Vorwerk or Bohn, because neither of them were members of the Board of Directors at the time of the events on which Count Three is based.

42. GECU denies all allegations of the Amended Complaint not specifically admitted herein.

AFFIRMATIVE DEFENSES

43. CUMIS is estopped to assert that the claim asserted by GECU under the Bond is not recoverable, and has waived the right to any such assertion.

44. CUMIS is not entitled to any of the relief sought because the construction of the Bond and Policy sought by CUMIS would contravene applicable statute.

45. The notice and proof of loss provisions of the Bond are void under Texas law.

46. Assuming, while denying, that the notice and proof of loss provisions are not void and assuming, while denying, that GECU did not comply therewith, CUMIS was not prejudiced thereby.

47. GECU hereby incorporates by reference, insofar as applicable, the allegations of the Counterclaim and Crossclaim filed herein by GECU.

48. Contrary to CUMIS' allegations that the directors of GECU made claims against themselves, and as demonstrated in the Cross-claim filed herein, the claims are on behalf of GECU, a corporate entity to which the directors owed and breached substantial duties. GECU, through its former President, Thomas J. Amiss, asserted claims against directors of GECU, and CUMIS was so notified in accordance with the Policy. GECU established an independent committee of three (3) directors, against whom no claims were or could be made, for the purpose of investigating and evaluating the claims against other directors and this committee has directed the filing of the Cross-claim. GECU alleges that this procedure is entirely appropriate and proper, and that it is the proper party to assert these claims.

WHEREFORE, GECU demands that the Plaintiff's First Amended Complaint be dismissed and judgment rendered on behalf of GECU in accordance with the Counterclaim filed herein.

Respectfully submitted,

**JERRY NUGENT
ROBERT C. BASS, JR.
RINEHART & NUGENT
1040 American Bank Tower
221 West 6th Street
Austin, Texas 78701
(512) 476-6527**

By /s/ ROBERT C. BASS, JR.
Bar Card Number 01889300

**EVERETTE G. ALLEN, JR.
CHARLES F. WITTHOEFT, JR.
LINDA L. ROYSTER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN
629 East Main Street
Richmond, Virginia 23202
(804) 771-9564**

**Attorneys for Government
Employees Credit Union**

CERTIFICATE OF SERVICE

I certify that a true copy of Government Employees Credit Union's Answer to Plaintiff's First Amended Complaint was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201, and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P.O. Box 1584, Austin Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P.O. Box 1148, Austin, Texas 78767, counsel for the defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lockridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E. G. Vorwerk; this 24 day of August, 1982.

/s/ ROBERT C. BASS, JR.

Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.

v.

**GOVERNMENT EMPLOYEES CREDIT UNION, CHESTER H. DORMAN,
JERRY M. GRAYBILL, JOHN T. LANCASTER, R.N. TRAPNELL,
BARBARA J. WOOD, J.T. GLASS, BOONE E. KEMP, O.L. PONDER,
H.H. WILLMS, and DORIS DEES BOLTON**

COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

**COMES NOW GOVERNMENT EMPLOYEES CREDIT UNION
("GECU"), defendant herein, complaining of CUMIS Insurance
Society, Inc. ("CUMIS"), asserting the following grounds:**

COUNT I

1. Between March, 1976 and December, 1979, Doris Dees Bolton ("Bolton") was President, Treasurer and an employee of GECU.

2. Between March, 1976 and December, 1979, Bolton caused GECU to contract to purchase, contract to sell, sell and lend numerous Government National Mortgage Association ("GNMA") pools of mortgages (hereinafter referred to as the "GNMA" Transactions") which resulted in substantial losses to GECU.

3. In causing GECU to enter into the GNMA Transactions, Bolton exceeded the authority granted to her by the Board of Directors as President, Treasurer and an employee of GECU.

4. In causing GECU to enter into the GNMA Transactions, Bolton caused GECU to conduct its business in an unsafe and speculative manner, threatening its solvency and endangering its reputation.

5. In causing GECU to enter into the GNMA Transactions, Bolton caused GECU to enter into transactions in violation of applicable statutes and regulations and of GECU's by-laws.

6. From March, 1976 to December, 1979, Bolton failed to properly inform the Board of Directors of the existence or nature of the GNMA Transactions or that GECU had sustained and was sustaining substantial losses on those transactions and failed to submit to the Board of Directors of GECU an accurate monthly financial report, as required by the by-laws of GECU.

7. From March, 1976, to December, 1979, Bolton failed to prepare an accurate balance sheet showing the condition of GECU, as required by the by-laws of GECU.

8. Each of said acts by Bolton constitute negligence and a failure to well and faithfully perform her duties.

9. As a direct and proximate result of Bolton's negligence and failure to well and faithfully perform her duties, GECU suffered a loss in excess of the jurisdictional limits of this Court.

10. On February 15, 1980, GECU duly notified CUMIS of the claim under the Bond.

11. In or about February, 1980, GECU substantially complied with the proof of claim requirements of the Bond, if any.

12. CUMIS failed and refused to investigate the claim made by GECU.

13. On May 8, 1981, GECU again notified CUMIS of the foregoing claim and filed with CUMIS a proof of claim.

14. GECU has fully complied with the terms of the Bond.
15. CUMIS breached its contract with GECU by failing and refusing to pay GECU pursuant to the provisions of the Bond, including without limitation:

CUMIS Insurance Society, Inc. . . . agrees to indemnify the Insured . . . (f)or direct loss of . . . any property, as defined herein, caused by the fraud or dishonesty of any of the Insured's employees, as defined herein, . . . or through the failure on the part of such employee . . . to well and faithfully perform his duties.
16. Said breach by CUMIS has caused GECU to sustain damages in an amount in excess of the jurisdictional limits of this Court.

COUNT II

17. The allegations of Paragraphs 1 through 16 of this Counterclaim are hereby incorporated by reference in this paragraph 17.
18. After notifying CUMIS of its claim under the Bond, GECU provided CUMIS with all documents which it requested and access to any witnesses which it wished to interview.
19. GECU offered to meet with CUMIS to discuss settlement of GECU's claim against CUMIS.
20. On January 12, 1982, CUMIS' counsel, James A. Knox, Esquire ("Knox"), convened a meeting of GECU's counsel and representatives, GECU's Board of Directors and the Board's counsel. At this meeting, GECU was advised for the first time that CUMIS denied coverage under the Bond, and that the instant action against GECU and the Directors had been filed that afternoon. Knox further stated, at this meeting, that CUMIS would withdraw the instant action if GECU's claim against the Directors for negligence and breach of duty was withdrawn, and otherwise attempted by intimidation to cause the Directors to breach their duties to GECU and its

members. CUMIS failed and refused to discuss settlement of the claim and, in filing the instant action, compelled GECU to file this counterclaim.

21. By said acts and other similar acts, CUMIS has:

- a. Not attempted in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear;
- b. Compelled policy holders to institute suits to recover amounts due under its policy by offering substantially less than the amounts ultimately recovered in suits brought by them;
- c. Not attempted in good faith to settle promptly claims where liability has become reasonably clear under one portion of the policy in order to influence settlement under other portions of the policy coverage;
- d. Failed to properly provide a policyholder a reasonable explanation of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the failure to offer a compromise settlement; and
- e. Failed to affirm coverage of a claim to a policyholder within a reasonable time after proof of loss has been made.

22. The acts enumerated in paragraph 21 above amount to unfair trade practices under Regulation 18663 of the State Board of Insurance and as such are violations of Article 21.21 of the State of Texas Insurance Code and have caused injury to GECU.

23. The acts enumerated in paragraph 22 above are also in violation of Article 21.21-2 of the State of Texas Insurance Code and Texas Business and Commerce Code, Section 17.46. The acts are, therefore, in violation of Article 21.21 of the Insurance Code and have caused damage to GECU.

COUNT III

24. The allegations of paragraphs 1 through 23 are hereby incorporated by reference in this paragraph 24.

25. GECU is required by statute to purchase "a blanket security bond covering all officers, employees, members of official committees, attorneys at law, and other agents of the credit union to protect the credit union against loss caused by the failure of a person to faithfully perform his duties."

26. In selling the Bond to GECU, CUMIS knew or ought to have known that GECU sought through the Bond to fulfill its statutory obligation as stated in paragraph 25 above.

27. In selling the Bond to GECU, CUMIS explicitly or impliedly represented to GECU that GECU's purchase of the Bond would fulfill its statutory obligation as stated in paragraph 25.

28. Assuming, while denying, that the Bond as presently written does not protect GECU against losses suffered as a result of the GNMA Transactions, for any reason whatsoever, then the Bond does not conform to the requirements of statute, and GECU is entitled to reformation of the Bond to so conform.

COUNT IV

29. The allegations of paragraphs 1 through 28 above are incorporated by reference in this paragraph 29.

30. Assuming, while denying, that the Bond as presently written does not protect GECU against losses suffered as a result of the GNMA Transactions, then CUMIS in selling the Bond to GECU misrepresented to GECU the nature and extent of the coverage provided by the Bond and/or the terms, benefits and advantages provided by the Bond.

31. Said misrepresentations constitute unfair and deceptive acts or practices in violation of V.A.T.S. Art. 21.21.

32. Said misrepresentations constitute deceptive trade practices in violation of the Texas Business and Commerce

Code, Chapter 17, Subchapter B, Section 17.41 *et seq.*, and regulations promulgated thereunder by the State Board of Insurance.

COUNT V

33. The allegations of paragraphs 1 through 32 above are hereby incorporated by reference in this paragraph 33.

34. In issuing the Policy to GECU, CUMIS represented that it would pay any loss within the limits of the Policy which loss resulted from a breach of duty, neglect, error, misstatement, misleading statement, omission, or other act done or wrongfully attempted by the directors and officers of GECU. Such actions have been alleged against said directors and officers, and CUMIS is now claiming that there is no coverage for such actions under the policy.

35. In addition to the representations set out in paragraph 34 above, CUMIS represented to GECU that it would not reasonably withhold its consent for the payment of charges and expenses incurred by the officers and directors in relation to the above matters claimed against said officers and directors. CUMIS has now refused to pay such costs and expenses of the officers and directors.

36. The representations set out in paragraph 34 and 35 above, made by CUMIS to GECU were, therefore, misleading and untrue. Such misrepresentations are in violation of Article 21.21 of the Texas Insurance Code and Texas Business and Commerce Code, Section 17.46 *et seq.*, and caused damages to GECU.

37. In addition thereto, CUMIS did not disclose to GECU that there was no coverage if the directors or a committee of neutral directors made a claim and that there was no coverage for damages incurred by anyone other than third parties. These were omissions of material facts necessary to make other policy representations made by CUMIS to GECU not misleading and are in violation of Article 21.21 of the Insurance Code and Texas Business and Commerce Code, Section 17.48 *et seq.*, and caused damages to GECU.

COUNT VI

38. The allegations of paragraphs 1 through 37 above are hereby incorporated by reference in this paragraph 38.

39. On or about February 15, 1980, CUMIS was given notice by GECU of a claim resulting from illegal or unauthorized investments.

40. CUMIS, through its agent and employee William J. Lauerman, obtained information concerning the claim through a telephone call with Thomas J. Amiss, President of GECU and through certain documents and information sent to Lauerman at GECU.

41. Between February 15, 1980 and May, 1981, CUMIS failed and refused to investigate the claim or negotiate with GECU concerning the claim.

42. Between February 15, 1980 and May 20, 1981, CUMIS failed and refused to pay to or settle with GECU for the amount of its loss, despite the fact that GECU had substantially satisfied all conditions precedent to CUMIS' liability under the Bond.

43. In failing and refusing to pay the amount of GECU's loss, CUMIS breached its contractual obligations to investigate and pay pursuant to the Bond.

44. As a direct and proximate result of said breach by CUMIS, GECU has been unable to make loans to its members as is normal and customary, has been unable to pay normal and customary dividends from undivided earnings, has been forced to sell assets in the form of real property in order to pay dividends, and has been required to enter into the conservatorship agreement which is attached to this Counterclaim as Exhibit "A", all to the damage of GECU in an amount as yet undetermined.

WHEREFORE, GECU demands:

(1) That the Plaintiff's Complaint against GECU be dismissed;

(2) That GECU have judgment against the Plaintiff in the amount of its actual damages, plus two times its actual damages, plus its attorneys' fees and costs expended herein;

(3) In the alternative, that the Bond be reformed to conform to statutory requirements; and

(4) That GECU have such other and further relief to which it may be entitled.

Respectfully submitted,

**Jerry Nugent
Robert C. Bass, Jr.
RINEHART & NUGENT
1000 American Bank Tower
Austin, Texas 78701
(512) 476-6527**

By: /s/ JERRY NUGENT

**Jerry Nugent
Bar Card #15132500**

**EVERETTE G. ALLEN, JR.
LINDA L. ROYSTER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN
629 Main Street
P.O. Box 1 Q
Richmond, Virginia 23202
(804) 771-9564**

**Attorneys for Government
Employees Credit Union**

CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Counterclaim to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox and Stradley, 1500 Republic Bank Tower, Dallas, Texas 75201, this 29th day of January, 1982.

/s/ JERRY NUGENT

Jerry Nugent

AGREEMENT

This Agreement, entered into this day of October, 1981, is drawn by and between Government Employees Credit Union (GECU) and TEXAS SHARE GUARANTY CREDIT UNION (TSGCU), both of Austin, Texas and is concurred in by the Credit Union Department, State of Texas.

It is recognized by all parties that GECU has reached the point in its operation where, without assistance from outside sources, it cannot maintain its solvency and meet all its obligations including payment of the customary dividend to its members.

It is recognized further that TSGCU is obligated to the members of GECU to the extent of guaranteeing to each and every one the payment of shares and deposits to the maximum extent of \$100,000 per account.

It is further the expressed desire of all parties concerned that a feasible method be found for preserving all memberships benefits and privileges for members of GECU, either through the continued operation of GECU or its merger into another credit union.

In order to facilitate the accomplishment of the desire and purpose stated heretofore, the board of directors of GECU hereby requests and appoints TSGCU, acting through its president to serve as conservator of GECU.

It shall be the ultimate responsibility of TSGCU to determine the method by which the best interests of all parties concerned can best be served, whether it be continued operation of GECU, merger of GECU with another credit union, or in the event neither of the above options can be achieved, through liquidation of GECU.

TSGCU in its capacity as conservator recognizes the benefits of continued operations. Accordingly TSGCU's first priority and effort will be to determine the feasibility of rehabilitating the credit union and the associated costs. However, because of time constraints, TSGCU will undertake parallel action to see if a suitable and willing merger partner

can be found. Options developed will be reviewed with the Executive Committee prior to presentation to the TSGCU board who must ultimately select the option to present to the Credit Union Department for its approval.

From the date of this agreement, until the selected objective has been achieved, or until this agreement is earlier terminated by the unanimous consent of all three parties hereto, TSGCU shall have full and complete authority and responsibility for the management and operation of GECU.

The board of directors of GECU, in requesting TSGCU to serve as conservator, transfers to TSGCU the authority and responsibility to make and carry out all decisions which law, bylaws and regulations otherwise place upon the GECU board. TSGCU agrees to consult with the GECU board through its executive committee, with the objective that all such decisions will represent concurrence of the two parties; however, in the event agreement is not arrived at, TSGCU shall make the determination and proceed.

TSGCU recognizes the importance of maintaining the employment, goodwill and support of the present employees. Therefore, TSGCU will consult with the Executive Committee on any personnel problems that are recognized as having the potential for terminating the employment of an employee. While believing that the welfare of employees is paramount, nothing in this Agreement shall affect TSGCU's obligation to initiate and promote efficient operations through training, evaluation and the realignment of employee duties if deemed advantageous.

TSGCU agrees that for the calendar quarter ending December 31, 1981, members of GECU shall be paid dividends on their respective accounts calculated at rates identical to those used for the quarter ended September 30, 1981.

This agreement shall conclude when the Commissioner, Credit Union Department, certifies one of the following: (1) That GECU is solvent and capable of operating under the direction of its board of directors; (2) That GECU has accomplished a merger with another insured credit union or

(3) That liquidation of GECU has been concluded and its charter cancelled.

None of the provisions of this agreement shall operate to prevent or limit the Credit Union Department, State of Texas, in the performance of its responsibilities as provided in the Texas Credit Union Act or related Rules and Regulations.

Signed,

Government Employees Credit Union

/s/ JERRY A. GRAYBILL

Chairman

/s/ BARBARA J. WOOD

Secretary

TEXAS SHARE GUARANTY CREDIT UNION

/s/ BUFORD B. LANKFORD

PRESIDENT

/s/ BILLY F. SPUICY

Chairman

/s/ JOHN P. PARSONS

Commissioner

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

**GOVERNMENT EMPLOYEES CREDIT UNION, CHESTER H. DORMAN,
JERRY M. GRAYBILL, JOHN T. LANCASTER, R. N. TRAPNELL,
BARBARA J. WOOD, J. T. GLASS, BOONE E. KEMP, O. L. PONDER,
H. H. WILLMS, and DORIS DEES BOLTON,**
Defendants.

**MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL DISCOVERY**

Facts

On January 12, 1982, CUMIS Insurance Society, Inc. ("CUMIS") filed a complaint against its insured, Government Employees Credit Union ("GECU"), and other insureds, present and former directors of GECU, seeking a declaratory judgment that CUMIS was not liable to GECU on a claim made by GECU under its bond with CUMIS, which bond was attached to and made a part of the Complaint. GECU's claim

against CUMIS under the bond was based on acts committed by a former officer, director and employee of GECU, Doris Dees Bolton. In this action, CUMIS also seeks a declaratory judgment that it has no duty or obligation under its Directors and Officers Liability Policy to any of the defendant directors for claims made by GECU against them for failure to properly perform their duties as directors. In subsequent pleadings, GECU filed a counter-claim against CUMIS, seeking recovery of losses sustained as a result of Bolton's failure to well and faithfully perform her duties; GECU also filed a cross-claim against the defendant directors seeking recovery of losses sustained as a result of their failure to properly perform their duties as directors.

GECU filed Government Employee's Credit Union's First Request for Production of Documents to CUMIS Insurance Society, Inc. on February 1, 1982. CUMIS in its response raised various general objections which it applies indiscriminately to GECU's requests number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 29, 30 and 31. Objections also were filed to GECU's requests number 27, 28, 32 and 33. CUMIS has produced certain documents responsive to other numbered requests. This memorandum will address each of CUMIS' objections to production of the requested documents.

I. OVERBREADTH AND BURDENSONENESS DUE TO VOLUME OF DOCUMENTS REQUESTED

In paragraph 2.a. of its response, CUMIS objects to production of the requested documents on the grounds that the requests are "overbroad" and that production would be "unduly burdensome and would cause great inconvenience and expense to CUMIS." This objection apparently is directed to the volume of documents requested; the burden asserted by CUMIS results from the necessity for CUMIS to review the documents prior to or in conjunction with production of them.

Counsel for GECU is unaware of any exception in the Federal Rules of Civil Procedure which would permit CUMIS to withhold documents otherwise properly requested merely because there are a large number of them. Rather, various remedies are appropriate to protect the insurance company from the expense and inconvenience which results from the production of large numbers of documents. For example, CUMIS may object to the request for production of documents on the grounds that the volume of documents requested renders the place of production unreasonable, although production was requested in Austin, Texas, where CUMIS initiated its lawsuit; in an effort to reach agreement with CUMIS, GECU has agreed to production of the documents at CUMIS' corporate offices in Wisconsin. In general, however, the fact that many documents are responsive to a request for production should be no bar to their production. CUMIS has initiated an action against its insureds after denying coverage of a loss in excess of \$2,000,000. Given the magnitude of the claim, and the complexity of the issues, CUMIS' objection on these grounds is specious and should be overruled.

II. OVERBREADTH DUE TO TIME

In paragraph 2.b. of CUMIS' response, the insurance company objects that the requests for production are overly broad in that they are unlimited in time. Again, counsel for GECU is unaware of any rule or exception which suggests that documents otherwise properly requested need not be produced if they were not recently generated. CUMIS has placed in issue the coverage of its bond; unless CUMIS comes forward with some factor such as a change in the language of the bond, which would indicate that documents generated prior to the change were not relevant to the current action, CUMIS should be required to produce all documents otherwise properly requested, regardless of the date on which they were generated. CUMIS' objection on the grounds that the requests are unlimited in time should be overruled.

III. ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

CUMIS also claims in paragraphs 2.c. and 2.d. of its response that certain requested documents are privileged attorney client communications or are the work product of attorneys or others. If so, CUMIS should be required to identify those documents for which it asserts a privilege. The burden of demonstrating grounds for refusing to produce documents is on CUMIS, *see e.g. North American Mortgage Investors v. First Wisconsin National Bank*, 6 F.R.D. 9 (E.D.Wisc. 1975), and CUMIS' bald assertion of privilege insufficiently justifies its refusal to produce a single document in the various categories to which it objects. *Camco, Inc. v. Baker Oil Tools, Inc.*, 45 F.R.D. 384 (S.D.Tex. 1968). Unless and until CUMIS meets that burden, it should be compelled to produce the requested documents. CUMIS' objections on the grounds of privilege should be overruled.

IV. RELEVANCE AND CONFIDENTIALITY

Finally, CUMIS objects in paragraph 2.e. of its response to production of the requested documents on the grounds of relevance, stating that "a majority" of the documents requested are not discoverable. Specifically, CUMIS suggests three categories of documents which it claims are not relevant to the subject matter involved in this action. According to CUMIS' response, "documents which might 'refer to' Insuring Clause A in a file relating to a claim based upon facts wholly distinguishable from this claim would in no way be relevant to this cause of action." CUMIS further states that, "documents which merely 'refer to' the other bond and policy provisions set forth in their request will be irrelevant and immaterial to this case." However, both of these categories of documents may well be relevant to issues raised by CUMIS, including alleged failure to comply with notice and proof of loss provisions of the bond and the nature of losses covered by the bond. Furthermore, GECU

has made various claims against CUMIS under Article 21.21 of the Insurance Code of the State of Texas, and Section 17.46 of the Business and Commerce Code of the State of Texas, calling into question CUMIS' dealings with other insureds under the discovery bond and the directors and officers liability policy, to which claims the requested documents are obviously relevant. Finally, GECU is entitled to production not only of documents which are admissible in this action but also to those which provide background and perspective to CUMIS' position. CUMIS' objections on the grounds of relevance should therefore be overruled.

CUMIS also asserts in paragraph 2.3 of its response, a somewhat novel privilege, that of an insurance company to prevent disclosure of information concerning its insureds. The existence of such a privilege has repeatedly been rejected by federal courts, *see Wright & Graham, Federal Practice and Procedure: Evidence* § 5431 at n.59 and cases cited therein, and should be rejected on the grounds of relevance and confidentiality should be overruled.

Conclusion

In an effort to reach agreement with CUMIS concerning production of the requested documents, GECU has offered to permit production of the documents at CUMIS corporate offices in Wisconsin, to enter into reasonable protective orders with respect to documents which CUMIS considers confidential, and otherwise to limit its requests based on CUMIS' assertion that it does not intend to raise certain issues in this matter. However, recognizing that discovery responses do not normally limit proof, *see e.g. Atlantic Coke-Cola Bottling Company v. Transamerica Insurance Company*, 61 F.R.D. 115

(N.D.Ga. 1972), GECU could be severely prejudiced if production of documents reasonably related to issues in this action is not required. Furthermore, CUMIS has wholly failed to satisfy its burden in refusing to produce the requested documents.

Respectfully submitted,

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Austin, Texas 78701
(512) 476-6527

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WEINBERG, COX & ALLEN
629 East Main Street
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(804) 771-9538

By /s/ JERRY NUGENT

Jerry Nugent
Bar Card No. 15132500

**Attorneys for Government
Employees Credit Union**

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Memorandum in Support of Motion to Compel Discovery was mailed, postage prepaid to Robert C. Howell, 711 West 7th St., Austin, Texas 78701; James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1550 Republic Bank Tower, Dallas, Texas 75201; Lloyd Lochridge and James A. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701; Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768 and to John C. Wilson, Wilson & Grosenheider, 711 West Seventh Street, P.O. Box 1584, Austin, Texas 78767, this 7th day of May, 1982.

/s/ JERRY NUGENT

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, CHESTER H. DORMAN,
JERRY M. GRAYBILL, JOHN T. LANCASTER, R. N. TRAPNELL,
BARBARA J. WOOD, J. T. GLASS, BOONE E. KEMP, O. L. PONDER,
H. H. WILLMS, and DORIS DEES BOLTON,
Defendants.

REPLY MEMORANDUM IN SUPPORT
OF GOVERNMENT EMPLOYEES CREDIT UNION'S
MOTION TO COMPEL DISCOVERY

I. Introduction

On February 2, 1982, Government Employees Credit Union ("GECU") filed and served Government Employees Credit Union's First Request for Production of Documents to CUMIS Insurance Society, Inc. ("CUMIS"). CUMIS served its response on March 5, 1982, objecting to virtually every request. After offering a reasonable compromise in an effort to permit the litigation to move forward (see Attachment 1), which CUMIS rejected, GECU moved to compel production of the requested documents, and CUMIS filed its Brief in Response to Government Employees Credit Union's Motion to Compel Production of Documents on June 23, 1982. Although CUMIS in its brief continues to broadly maintain objections to virtually

all of GECU's requests, this reply memorandum addresses with specificity the relevance of the requested documents to the subject matter of this litigation and the applicability of the privileges CUMIS asserts.

II. Requests 2 through 16 and 29 through 31

Documents which are described in Requests 2 through 16 relate to specific provisions of CUMIS' policies, the intent, meaning, interpretation and construction of which are issues directly raised by CUMIS' own complaint against its insureds, as well as by GECU's and other defendants' Counterclaims. For example, CUMIS has called into question in its declaratory judgment action the insuring clauses, exclusions and conditions of the policies. It is difficult to understand how CUMIS can put the interpretation and construction of certain provisions of its policies directly in issue by filing suit against its own insureds and then claim that documents which interpret, construe, reflect, refer to or relate to those provisions are irrelevant.

Although CUMIS states that some of the requested documents may involve factually dissimilar claims against CUMIS, this fact does not render such documents irrelevant. Rather, it is the interpretation and construction of the insurance policy which is the subject matter of CUMIS' declaratory judgment action as well as the counterclaims and crossclaims herein, and it is documents relating to the interpretation and construction of that policy which are properly requested in requests 2 through 16.

Similarly, requests 29, 30 and 31 describe documents concerning claims against CUMIS which are factually similar to the claims by GECU against CUMIS and against GECU's present and former directors which are the subject of this lawsuit. The documents described in requests 29, 30 and 31, as well as those described in paragraphs 2 through 16 are thus directly relevant not only to the merits of GECU's Crossclaim and Counts I and VI of GECU's Counterclaim, but also to Counts II through V of GECU's Counterclaim which allege that CUMIS has engaged in various unfair and deceptive trade

practices. Because of the manner in which CUMIS dealt with its insureds in this case and in others with which counsel for GECU is familiar, GECU believes that CUMIS has as a general practice not attempted in good faith to effectuate prompt, fair and equitable settlements of claims, has compelled policyholders to institute suit so that CUMIS might delay as long as possible the settlement of substantial claims, has failed to settle claims under one portion of the policy in order to influence settlement under other portions of the policy, has failed to reasonably explain to policyholders the basis on which CUMIS has denied claims or refused to offer compromise settlements, and has otherwise dealt improperly with its insureds. Counsel for GECU have become aware of sufficient instances of such practices to believe that a pattern of such behavior by CUMIS can be shown, and has therefore included in its Counterclaim against CUMIS claims for unfair trade practices in violation of Regulation 18663, Article 21.21 of the Texas Insurance Code, and Section 17.46 of the Texas Business and Commerce Code. Requests 2 through 16 and 29 through 31 describe documents which will tend to show the manner and thoroughness of CUMIS' investigation of claims, whether CUMIS sought or followed the advice of adjusters and attorneys in paying or denying claims, the reasons for CUMIS' acceptance or denial of claims, and other matters concerning CUMIS claims settlement practices, all of which are directly relevant to this litigation. Since CUMIS insures over 21,000 credit unions in the United States, many of them in the State of Texas, it would be unreasonable to require GECU to develop evidence of CUMIS' practices in other cases from the many credit unions CUMIS insures, when that information is directly relevant to this case and readily available from CUMIS' own files. Thus, it is apparent that the documents described in requests 2 through 16 and 29 through 31 are relevant to the subject matter of this lawsuit and were properly requested by GECU pursuant to Rule 34 of the Federal Rules of Civil Procedure.

III. Requests 25, 27, 28, 32 and 33

CUMIS has also objected to and/or refused to produce the documents described in requests 25, 27, 28, 32 and 33 of GECU's First Request for Production of Documents to CUMIS. Paragraph 25 requests correspondence referred to in CUMIS' own complaint, specifically letters dated May 13 and 18, 1981, from George Patton to CUMIS. CUMIS' brief supporting its objections does not maintain any objection to producing these documents, on which CUMIS apparently intends to rely in proving its case, and production of them should be compelled.

Request 27 describes documents which contain, reflect, refer to or relate to GECU or the Bond which is the subject of this litigation. CUMIS objects that the request includes documents which are properly excluded from production under Rule 34 of the Federal Rules of Civil Procedure as privileged attorney-client communications or trial preparation materials. GECU does not, of course, argue that CUMIS must produce documents properly excluded on those grounds. However, CUMIS should be compelled to produce those documents which are not covered by such exclusions and to object with specificity to production of those documents which are covered by such exclusions. CUMIS' argument that it should not produce *any* of the requested documents because *some* are properly excluded from production is obviously erroneous. Unquestionably, documents concerning GECU, the defendant CUMIS has sued, and that defendant's insurance policy are relevant to the subject matter of this litigation and production of them should be compelled.

Furthermore, CUMIS' argument that it should not be required to produce documents described in request 27 which might properly have been considered trial preparation material in other litigation is spurious. In general, trial preparation materials retain their protected character in subsequent litigation only when there is a close relationship between the two actions, *see* 8 Wright & Miller, § 2024, pp. 200-201, and indeed many courts have held the work product doctrine wholly inapplicable in subsequent litigation. *See e.g. Honeywell, Inc. v.*

Piper Aircraft Corporation, 50 F.R.D. 117 (M.D.Pa. 1970); *United States v. IBM*, 66 F.R.D. 154 (S.D.N.Y. 1974).

Furthermore, where, as in the instant case, it is the very behavior of an insurer in handling a claim which is at issue, the insurer cannot withhold the documents in its own files which reflect that behavior. In *Chitty v. State Farm Mutual Automobile Insurance Co.*, 36 F.R.D. 37 (E.D.S.C. 1964), for example, the plaintiff's action was for negligence and bad faith by the defendant insurer in refusing to settle prior litigation against the plaintiff-insured. The Court in that case wholly rejected the insurer's privilege and work product claims as applied to documents generated in the prior litigation in which the insurer allegedly dealt in bad faith, 36 F.R.D. at 40-42, stating:

Whether State Farm properly investigated the case, whether it sought and followed advice and recommendation of its agents, adjusters and attorneys, are facts which are surely relevant to the issue of its negligence, recklessness, and bad faith in not settling the prior case. Evidence of these matters, if any exists, are in the files of State Farm and may be quite necessary as proof of an unreasonable and arbitrary attitude on the part of State Farm in not settling the cases when advised to do so. Such evidence is not otherwise available to Chitty in advance of trial. She cannot properly prepare and try her case without this information; the denial of her Motion will result in hardship and prejudice; and the production of such items will aid substantially in proving her cause of action, if she has one.

36 F.R.D. at 40. In the instant action, it is precisely CUMIS' handling of prior claims, as well as its handling of GECU's present claim, which are the subject of GECU's Counterclaim. Documents relating to those claims are, thus, not only directly relevant, but also crucial to the very heart of GECU's claim and absolutely unobtainable from any other source.

Finally, documents concerning initial or routine evaluation and investigation of an insurance claim are not prepared in anticipation of litigation, although litigation may result if the claim is denied, *Atlanta Coca-Cola Bottling Co. v. Transamerica Insurance Co.*, 61 F.R.D. 115 (N.D.Ga. 1972), and CUMIS' suggestion in its brief that every document reflecting evaluation or analysis of a claim against CUMIS, including that of GECU, is protected from discovery must be rejected. The cited case involved a claim by an insured on a fidelity policy against the insured which denied the claim. Among other things, the insured alleged that the insurer denied the claim without reasonable cause and in bad faith. The Court required the insurer to produce material in its claims file on the plaintiff's claim, since "[t]he information sought will to some degree demonstrate the thoroughness with which defendant investigated and considered plaintiff's claim and is thus relevant to the question of the good faith or bad faith of defendant in denying the claim." 61 F.R.D. at 117. Similarly, documents in CUMIS' files which reflect its claims handling practices, including the manner in which CUMIS responded to GECU's claim, are relevant to the subject matter of this litigation, not protected as trial preparation materials or privileged communications, and should be produced.

With respect to Request 28, to which CUMIS similarly objects on the ground that the documents are protected by the attorney-client privilege, Request 28 describes documents which reflect, refer to or relate to correspondence between or among parties to this litigation, their attorneys, and other former directors of GECU. No attorney-client privilege could conceivably exist with respect to communication among the parties themselves, none of whom are attorneys. If CUMIS has in its possession communications or correspondence to which George Patton, formerly counsel to GECU, or Robert C. Howell, counsel to defendant Doris D. Bolton, is a party, those communications have already been disclosed to CUMIS and are therefore no longer privileged, if indeed a privilege ever existed with respect to them. CUMIS' assertion of an insured-insurer privilege, while overwhelmingly rejected by the federal courts, is the more outrageous in the context of this case in

which CUMIS has *denied* coverage of *any* of the asserted claims and filed suit against its own insureds.

Correspondence between and among parties to this case is obviously relevant insofar as those communications relate directly to the claims at issue here, including CUMIS' handling of those claims. Other communications among the parties which CUMIS might have in its possession are also relevant to the parties' knowledge and understanding of the insurance policies involved, representations by CUMIS, notice, and other relevant matters. CUMIS should be compelled to produce all such documents.

Although CUMIS in its brief supporting its objections no longer maintains objections to requests 32 and 33, it has produced no documents responsive to those requests. The documents described in request 32 relate to approval of the insurance policies at issue in this litigation by the Board of Insurance of the State of Texas and communication concerning those policies between CUMIS and the Board of Insurance. In its Complaint, CUMIS has maintained that the insurance policies in question do not cover the kind of loss suffered by GECU and do not cover the claim made by GECU against its directors. GECU has maintained in its Counterclaim that the discovery bond was intended to satisfy GECU's obligations under the Texas Credit Union Act to obtain coverage for loss suffered as a result of an employee's failure to well and faithfully perform her duties and that the notice provision of the discovery bond is void under Texas law. Documents described in request 32 are obviously relevant to these questions in that they may contain representations concerning the intent, interpretation and construction of the insurance policies at issue. CUMIS should be required to produce the requested documents.

Finally, request number 33 describes documents which reflect, refer to or relate to specific allegations in CUMIS's own Complaint. In its brief, CUMIS has maintained no objection to producing these documents, but has not produced them. Since these documents relate specifically to CUMIS' own assertions, it is apparent that there can be no objection on grounds of

relevance or privilege, and CUMIS should be required to produce them.

IV. Burdensomeness and Overbreadth

CUMIS' primary objection to producing any of the documents described in paragraphs 2 through 16, 25, and 28 through 33 is burdensomeness. By this objection, CUMIS apparently maintains that it should not be required to segregate from its files those documents which are described in GECU's requests, review those files prior to production, or transport them to Austin, Texas, where this litigation was commenced by CUMIS. Although CUMIS is correct that a party should not be put to unnecessary burden and expense in discovery, the first question must always be whether the documents were properly requested and are relevant to the subject matter of the litigation. As demonstrated in the preceding sections of this memorandum, the requested documents are highly relevant, and GECU in an effort to lessen the burden on CUMIS agreed to production at CUMIS' corporate headquarters in Wisconsin. Thus, the only burden on CUMIS is that of reviewing the documents prior to production to cull those to which it claims legitimate privilege. It must be remembered that the privilege is CUMIS' to assert or waive, and the suggestion that GECU should pay any cost associated with CUMIS' assertion of that privilege should be rejected. It must also be remembered that CUMIS itself instigated this litigation against its own insureds, before it had even denied coverage of the claim. Well over \$2,000,000 is involved in GECU's primary claim, and a claim for treble damages has been pled in good faith. The issues involved are numerous and complex. CUMIS has chosen to litigate those issues, having refused to even negotiate a settlement of GECU's claim, and should not now be heard to complain that the litigation is burdensome. GECU made a good faith effort to compromise with CUMIS concerning production of the requested documents by agreeing to production of CUMIS' offices and agreeing to substantially narrow the requests based on GECU's present understanding of CUMIS' position in this litigation, desiring only leave to renew the

requests should facts developed later so indicate. CUMIS refused GECU's offer of compromise and made no proposal. Under the circumstances, CUMIS' complaint that the request for production is burdensome should be rejected.

Respectfully submitted,

Jerry Nugent
Robert C. Bass, Jr.
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By /s/ JERRY NUGENT
Bar Number 15132500

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply Memorandum in Support of Government Employees Credit Union's Motion to Compel Discovery was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201, and John C. Wilson, Wilson & Grosenheider, 711 West Seventh Street, P.O. Box 1584, Austin, Texas 78767, counsel for plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P.O. Box 1148, Austin, Texas 78767, counsel for defendant Doris Dees Bolton; Lloyd Lochridge and James A. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the defendant directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E.G. Vorwerk, this 12th day of July 1982.

/s/ JERRY NUGENT

March 18, 1982

JAMES A. KNOX
STEPHEN L. BASKIND
VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY
1500 Republic Bank Tower
Dallas, Texas 75201

Re: CUMIS Insurance Society, Inc. v.
Government Employees Credit Union, *et al.*
Civil Action No. A-82-CA-13

Gentlemen:

The following is a suggestion for compromise with respect to Government Employees Credit Union's First Request for Production of Documents to CUMIS Insurance Society, Inc.

With respect to your objection number 2.a., to document requests 2 through 16, we will agree to the following modifications, reserving the right to renew our request should issues arise as a result of a change in CUMIS' position or new facts of which we are not presently aware:

- a. We will agree to exclude from document request number 2, documents concerning claims made under insuring clause A which involved criminal acts such as larceny or embezzlement.
- b. We will agree to delete document requests number 3, 4, 6, 7, 13, 14.
- c. We will agree to delete the phrase "reflect, refer to or relate to" from document requests 5, 9, 10, 12.
- d. We will make no changes to document requests 8, 11, 15 or 16, except insofar as paragraph 16 requests documents relating to changes in terminology in provisions of the policy referred to in document requests number 3, 4, 6, 7, 13 and 14.

With respect to your objection 2.b., we will not agree to any limitation with respect to time.

With respect to your objection 2.c., we will expect a listing which identifies documents which are withheld on the grounds of attorney-client privilege.

With respect to your objection 2.d., although there may be some documents which were prepared in anticipation of the referenced litigation, CUMIS is certainly not entitled to withhold documents prepared in anticipation of other and separate litigation. GECU will expect production of all such documents and a listing identifying documents legitimately withheld on the grounds of the work product doctrine.

With respect to your objection 2.e., we absolutely disagree that the documents requested, as modified above, are not relevant to the subject matter involved in this litigation or reasonably calculated to lead to the discovery of admissible evidence.

With respect to your objection 2.f., assuming the documents to be produced are indeed voluminous, we will agree to inspect them at CUMIS' offices on March 29 and March 30, 1982.

With respect to the objections to request number 27 contained in your response, paragraph 13, we again recognize that some such documents may be privileged or covered by the work product doctrine and expect a listing of all such documents. With respect to limiting the breadth of request number 27, we will agree to limit the request to documents contained in CUMIS' claims files on GECU and CUMIS' underwriting files on GECU.

With respect to CUMIS' objection number 15 to requests number 29, 30 and 31, we will not agree to any alteration of these requests. Although again we agree that some documents may be covered by the attorney-client privilege, we do not agree that virtually all of the materials would be within the scope of the work product doctrine or that such documents are not relevant or reasonably calculated to lead to the discovery of admissible evidence.

With respect to CUMIS' objection number 17 to request number 33, we again will agree to no modification of this request. CUMIS made certain allegations of fact in the listed paragraphs and we are entitled to any documents having to do with those allegations of fact. To suggest that such a request is overbroad is patently erroneous.

In view of our agreement to schedule depositions for the week of April 19, 1982, I would appreciate your prompt response to this compromise suggestion.

Sincerely,

LINDA L. ROYSTER

LLR/hlm

bcc: Jerry Nugent
Robert C. Bass, Jr

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff.

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*
Defendants.

MOTION FOR SANCTIONS AGAINST PLAINTIFF

Defendant, Government Employees Credit Union ("GECU"), by counsel, pursuant to Rule 37 of the Federal Rules of Civil Procedure, respectfully moves the Court to impose against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), the sanctions specified below as a consequence of CUMIS' unjustified failure and refusal to comply with this Court's August 4, 1982 Order compelling CUMIS to produce the documents responsive to GECU's First Request for Production of Documents, filed herein on February 1, 1982.

GECU moves that the following sanctions be imposed against CUMIS pursuant to Rule 37(b)(2).

(A) That CUMIS be adjudicated to be in contempt of this Court as a result of its willful refusal to comply with the August 4, 1982 Order, and that CUMIS be required to pay punitive damages to GECU in an appropriate amount to punish it for such contumacious conduct;

(B) That an order be entered striking and dismissing with prejudice CUMIS' Complaint and First Amended Complaint

against GECU, and forbidding CUMIS from offering any evidence of any kind or nature at trial in opposition to GECU's Counterclaim;

(C) That, in the alternative to paragraph (B) above, an order be entered staying CUMIS from all further actions or proceedings against or concerning GECU in this or any other court, including, but not limited to, the initiation by CUMIS of any further discovery of any kind against GECU or any other party herein, unless and until CUMIS has satisfied the Court that it has fully complied with its obligations under the August 4, 1982 Order; and,

(D) That CUMIS pay to GECU its reasonable expenses, including attorney's fees, caused by CUMIS' unjustified failure to comply with the August 4, 1982 Order of this Court.

This Motion is based upon the papers previously filed herein and the Affidavit of Charles F. Witthoefft, co-counsel for GECU, attached hereto as "Exhibit A."

Pursuant to Local Rule 14(n) of this Court, counsel for GECU advises the Court that, as is more fully described in Exhibit A hereto, counsel for GECU have, in good faith, conferred personally by telephone and have corresponded with CUMIS' counsel, but have been unable to resolve the impasse caused by CUMIS' failure to produce the documents as required.

A sketch order is submitted herewith.

Respectfully submitted,

JERRY NUGENT
ROBERT C. BASS, JR.
RINEHART & NUGENT
1000 American Bank Tower
Austin, Texas 78701
(512) 476-6527

By: /s/ ROBERT C. BASS, JR.

Bar Card Number 01889300

EVERETTE G. ALLEN, JR.
CHARLES F. WITTHOEFFT
LINDA L. ROYSTER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN
629 East Main Street
P. O. Box IQ
Richmond, Virginia 23202
(804) 771-9500
Counsel for Government
Employees Credit Union

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201, and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P.O. Box 1584, Austin, Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P.O. Box 1148, Austin, Texas 78767, counsel for the defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E.G. Vorwerk, this 1st day of September, 1982.

/s/ ROBERT C. BASS, JR.

Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

AFFIDAVIT OF COUNSEL FOR
GOVERNMENT EMPLOYEES CREDIT UNION IN
SUPPORT OF MOTION FOR SANCTIONS AGAINST
PLAINTIFF

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

Charles F. Witthoefft, being first duly sworn, deposes and says:

(1) Affiant is a member of the law firm of Hirschler, Fleischer, Weinberg, Cox & Allen of Richmond, Virginia. Affiant and Everette G. Allen, Jr. and Linda L. Royster, both of his firm, are co-counsel for defendant, Government Employees Credit Union ("GECU"), in this case. Jerry Nugent and Robert C. Bass, Jr. of the law firm of Rinehart & Nugent of Austin, Texas, are also co-counsel for GECU herein.

(2) Affiant is familiar with the various events relevant to GECU's Motion for sanctions against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), and he makes this Affidavit in support of such Motion.

(3) Immediately upon receipt of a copy of the Court's August 4, 1982 Order compelling discovery, GECU's counsel, Ms. Royster, telephoned Stephen L. Baskind, counsel for CUMIS, to make arrangements for the commencement of CUMIS' production of documents responsive to GECU's February 1, 1982 First Request for Production of Documents, and to advise CUMIS' counsel that GECU's documents were available for their review in Austin. On August 9, 1982, Mr. Baskind returned Ms. Royster's telephone call, during which conversation the foregoing matters were discussed. Mr. Baskind stated that he and his client had not yet determined how they would respond to the August 4, 1982 Order; based upon Mr. Baskind's statements on that occasion, it appeared that no meaningful effort had been made by CUMIS or its counsel to prepare for or expedite the long-delayed production of CUMIS' documents.

(4) By letter dated August 11, 1982, delivered by "Federal Express," Ms. Royster wrote Mr. Baskind to confirm once again GECU's position. A true copy of Ms. Royster's August 11, 1982 letter to Mr. Baskind is attached hereto as "Exhibit 1." In that letter, Ms. Royster proposed that GECU could commence its review of CUMIS' documents as early as Monday, August 16, 1982, and Mr. Baskind was asked to contact GECU's counsel by August 13, 1982 so as to confirm the details of this process.

(5) When no response was received from CUMIS' counsel on this urgent subject, affiant telephoned Mr. Baskind on August 17, 1982 to attempt again to determine CUMIS' position. Affiant was informed by Mr. Baskind that CUMIS was still considering its position and its response to this Court's August 4, 1982 Order. Mr. Baskind assured affiant that he would notify him of CUMIS' position on or before Friday, August 20, 1982. Affiant confirmed his August 17, 1982 conversation by letter to Mr. Baskind. "Exhibit 2" is a true copy of that letter to Mr. Baskind, which was also delivered to him by "Federal Express."

(6) On Thursday afternoon, August 19, 1982, Mr. Baskind telephoned affiant to inform him that he was unable to state

CUMIS' position on the production of its documents, but would be in a position to do so "the first of next week." However, as before, no word from CUMIS has been received and CUMIS continues to "stonewall" GECU with respect to the review of documents which the Court has determined GECU is entitled to review.

(7) None of GECU's counsel have had any communication from CUMIS' counsel on this subject since August 19, 1982, and CUMIS has continued its refusal to produce documents originally requested by GECU in February, 1982, notwithstanding and in spite of the clear instruction of the Court in its August 4, 1982 Order to produce all documents requested by GECU.

(8) Upon information and belief, CUMIS' failure to produce its documents is without justification or excuse, and is part of a continuing, bad faith effort by CUMIS to avoid its legitimate obligations to its insured, GECU, with respect to the losses described in GECU's Counterclaim herein.

(9) As repeatedly pointed out to CUMIS' counsel, GECU must review the documents of CUMIS responsive to its document request before GECU can intelligently proceed with further discovery. CUMIS' failure to comply with the subject document request and this Court's August 4, 1982 Order has significantly delayed GECU's preparation for trial, and threatens GECU's ability to complete its discovery prior to the November 10, 1982 discovery cutoff imposed by the Court. If CUMIS is permitted to continue with its discovery, or to take other action against GECU in this or other proceedings, while it has failed to fully comply with the August 4, 1982 Order of this Court, it is possible that CUMIS will gain a procedural advantage over GECU and, thereby, benefit from its willful and contumacious conduct.

(10) GECU has been required to incur attorney's fees and expenses totalling \$780.00 in moving the Court for sanctions against CUMIS and otherwise seeking to obtain the production of CUMIS' documents requested in February, 1982, and it is respectfully submitted that CUMIS should be required to pay such reasonable expenses, both with respect to the Motion, this

Affidavit and GECU's other efforts to require CUMIS to comply with GECU's First Request for Production of Documents.

/s/ CHARLES F. WITTHOEFFT

Charles F. Witthoeft

Subscribed and sworn to before me this 31st day of August, 1982.

/s/ MARY A. FARMER

Notary Public

My Commission Expires: 9-04-83

EXHIBIT 1

HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN
Main Street Centre
629 East Main Street P.O. Box 1Q
Richmond, Virginia 23202

August 11, 1982

STEPHEN L. BASKIND
VIAL, HAMILTON, KOCH,
TUBB, KNOX & STRADLEY
1500 Republic Bank Tower
Dallas, Texas 75201

Re: CUMIS Insurance Society, Inc. v. GECU, et al.

Dear Steve:

Thank you for your August 9, 1982, return of my call from the previous week concerning document production. I want to confirm with you that GECU is prepared to comply promptly with the judge's order. Please contact Robert Bass to arrange a mutually convenient time for your review of the documents.

We are prepared to review CUMIS' documents as soon as you can make them available. In view of the November 10 discovery cut-off, and the twenty-five depositions you have previously indicated you would take, it is imperative that document production begin immediately. We, of course, cannot go forward with depositions until we have reviewed CUMIS' documents.

I suggest that the review begin August 16, 1982, at CUMIS' headquarters or in Austin, whichever you prefer. Please contact Rick Witthoefft or me by August 13, 1982, so that I can make travel arrangements for the weekend. It would also be helpful for me to have an estimate of the approximate

volume of the documents, so that I can determine how many people to bring to review them, as well as what arrangements we need to make to facilitate copying.

Sincerely,

/s/ LINDA L. ROYSTER

Linda L. Royster

LLR/sdt

bcc: Rick Witthoefft

EXHIBIT 2

HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN
Main Street Centre
629 East Main Street P.O. Box 1Q
Richmond, Virginia 23202

August 17, 1982

STEPHEN L. BASKIND, ESQUIRE
VIAL, HAMILTON, KOCH, TUBB,
KNOX & STRADLEY
1500 Republic Bank Tower
Dallas, Texas 75201

Re: CUMIS Insurance Society, Inc. v. GECU, et al.

Dear Steve:

The following will confirm our telephone conversation of August 17, 1982, concerning production of CUMIS' documents.

You indicated that you were considering your response to Judge Garcia's August 4, 1982 Order as it relates to CUMIS' underwriting, claims and litigation files (requested in paragraphs 2 through 16 and 29 through 31 of GECU's request); that is, whether you would pursue an appeal of that ruling or whether CUMIS would proceed with its document production. You indicated that you would advise me of your position by the end of this week.

In response to your statement that, to the best of your recollection, you have produced everything requested by GECU except CUMIS' underwriting, claims and litigation files, I believe your recollection is inaccurate. The documents requested in paragraphs 25, 27, 28, 32 and 33 of GECU's request also have not been produced.

To the extent CUMIS objected at all to these requests, the objections were overruled by Judge Garcia, and the documents responsive do not fall into the categories of documents we

discussed. Accordingly, we assume CUMIS will produce these documents immediately as required by Judge Garcia.

As we have previously informed you, documents responsive to CUMIS' request are available for your inspection upon reasonable notice at the offices of GECU in Austin.

As we discussed, we are simply unable to intelligently plan a deposition schedule in the absence of the review of CUMIS' documents.

I look forward to hearing from you by August 20, 1982.

Very truly yours,

/s/ CHARLES F. WITTHOEFT

Charles F. Witthoeft

CFW: sdt

bcc: Robert C. Bass, Jr.
Linda L. Royster

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

**SECOND MOTION FOR SANCTIONS
AGAINST PLAINTIFF**

Defendant, Government Employees Credit Union ("GECU"), by counsel, pursuant to Rule 37 of the Federal Rules of Civil Procedure, respectfully moves the Court to impose against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), the sanctions specified below as a consequence of CUMIS' unjustified failure and refusal to comply with this Court's August 4, 1982, and September 22, 1982 Orders compelling CUMIS to produce the documents responsive to GECU's First Request for Production of Documents, filed herein on February 2, 1982.

(A) That CUMIS be adjudicated to be in contempt of this Court as a result of its willful refusal to comply with the August 4, 1982, and September 22, 1982 Orders, and that CUMIS be required to pay punitive damages to GECU in an appropriate amount to punish it for such contumacious conduct;

(B) That an order be entered striking and dismissing with prejudice CUMIS' Complaint and First Amended Complaint

against GECU, and that an order of default judgment be entered against CUMIS on GECU's Counterclaim;

(C) That CUMIS pay to GECU its reasonable expenses, including attorneys' fees, caused by CUMIS' unjustified failure to comply with the August 4, 1982, and September 22, 1982 Orders of this Court.

This Motion is based upon the papers previously filed herein and the Affidavit of Charles F. Witthoefft, co-counsel for GECU, attached hereto as "Exhibit A".

Pursuant to Local Rule 14(n) of this Court, counsel for GECU advises the Court that, as is more fully described in Exhibit A hereto, counsel for GECU have, in good faith, conferred personally by telephone with CUMIS' counsel, but have been unable to resolve the impasse caused by CUMIS' failure to produce the documents as required.

Respectfully submitted,

EVERETTE G. ALLEN, JR.
CHARLES F. WITTHOEFT
LINDA L. ROYSTER
HIRSCHLER, FLEISCHER, WEINBERG
COX & ALLEN
629 East Main Street
P.O. Box 1Q
Richmond, Virginia 23202
(804) 771-9500

By /s/ LINDA L. ROYSTER

JERRY NUGENT
ROBERT C. BASS, JR.
RINEHART & NUGENT
1000 American Bank Tower
Austin, Texas 78701
(512) 476-6527

Counsel for Government
Employees Credit Union

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201 and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P.O. Box 1584, Austin, Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, counsel for the Defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P.O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E.G. Vorwerk, this 14th day of October, 1982.

/s/ **LINDA L. ROYSTER**

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff.

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

**GECU'S MEMORANDUM IN SUPPORT OF
SECOND MOTION FOR SANCTIONS**

FACTS

On February 2, 1982, the defendant, Government Employees Credit Union ("GECU"), served its request for production of documents on CUMIS Insurance Society, Inc. ("CUMIS"). CUMIS filed its response on March 8, 1982, although it did not move for a protective order. After GECU had communicated to CUMIS a suggestion for compromise with respect to the document production, which compromise CUMIS rejected without suggesting a counterproposal, GECU moved to compel production of the documents. After briefs were filed both by CUMIS and by GECU, this court entered its order compelling production on August 4, 1982. CUMIS stalled GECU's inquiries concerning document production for over a month. On September 1, 1982, GECU filed its first Motion for Sanctions Against Plaintiff which is still pending.

On September 14, 1982, CUMIS filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit, seeking to overturn this court's August 4, 1982 order on the grounds that the order constituted a gross abuse of discretion. The petition for writ of mandamus was summarily denied on October 1, 1982. This court had in the interim issued its September 22, 1982 Order Compelling Production and Protective Order.

As the attached affidavit reflects, counsel for GECU has spoken with counsel for CUMIS by telephone on two occasions since the petition for writ of mandamus was denied. On October 4, 1982, James A. Knox stated that his associate, Stephen L. Baskind, was to have contacted CUMIS concerning the document production after the writ of mandamus was denied. Mr. Knox did not know the outcome of Mr. Baskind's conversation with CUMIS, and, since Mr. Baskind was out of town, Mr. Knox stated that he or Mr. Baskind would contact counsel for GECU on October 6, 1982. On that day, Mr. Baskind informed counsel for GECU that CUMIS' in-house counsel would be out of the office for a period of time in October or early November, and therefore could not review the documents to prepare them for production promptly. Mr. Baskind further stated that production could not begin until November 15, 1982, one and one-half months after the petition for writ of mandamus was denied. Counsel for GECU proposed that production of at least some of the requested documents begin immediately, and stressed that GECU was willing to cooperate with CUMIS to the greatest extent possible to facilitate production for both parties. Mr. Baskind agreed to discuss the matter with his client and to contact Mr. Witthoefft again. No further communication between counsel for GECU and counsel for CUMIS has occurred, and CUMIS has produced no documents either to GECU or, apparently, for *in camera* inspection.

**CUMIS' Flagrant Non-Compliance With This
Court's Orders Justifies Dismissal of its
Complaint and Entry of Default Judgment on
Behalf of GECU**

CUMIS' patent and callous disregard of the orders of this court and the decision of the United States Court of Appeals for the Fifth Circuit justifies the most severe sanctions. GECU has now waited for nine months while CUMIS has stone-walled the parties and this court; even after its petition for writ of mandamus was denied, CUMIS' only proposal for production involved a further delay of one and one-half months. The only appropriate sanctions in this case are dismissal of CUMIS' complaint against GECU with prejudice and entry of a default judgment against CUMIS on GECU's counterclaim. These sanctions are appropriate not only because CUMIS' abject refusal to produce the requested documents is obviously in deliberate disregard of the orders of this court and the United States Court of Appeals for the Fifth Circuit, but also because CUMIS' failure makes it impossible for GECU either adequately to defend against CUMIS' action or adequately to prosecute its own action against CUMIS.

Under Rule 37(b), dismissal and default judgment are permissible sanctions where non-compliance is due to flagrant bad faith or disregard of a party's responsibilities and where no less drastic remedy would be equally effective. *Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979); *Diaz v. Southern Drilling Co.*, 427 F.2d 1118 (5th Cir.), cert. denied *sub nom. Trefina, A. G. v. United States*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed. 2d 115 (1970); *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976). The facts in this case justify the imposition of those sanctions.

As is apparent from the record in this case and in the court of appeals, from February 2, 1982 until August 4, 1982 when this court entered its order compelling production, counsel for CUMIS made no attempt to ascertain the most rudimentary facts concerning the volume, method of storage or possible retrieval of CUMIS' documents, since that information was not

provided to this court (*see* Response to Government Employees Credit Union's First Request for Production of Documents to CUMIS Insurance Society, Inc., filed March 8, 1982 and Brief in Response to Government Employees Credit Union's Motion to Compel Production of Documents, filed June 24, 1982). After the August 4, 1982 order was entered, CUMIS apparently ascertained for the first time the approximate number of files which CUMIS maintains, although not the number of documents, and provided that information to the court of appeals (*see* Affidavit of William J. Lauerman, Appendix 6, Petition for Writ of Mandamus). However, even five days after the petition for writ of mandamus was denied, CUMIS and its counsel had obviously not even begun to prepare the documents for production. Counsel for CUMIS suggested a further delay of one and one-half months, apparently because CUMIS' in-house counsel was too busy with other business which CUMIS considered more pressing than the orders of this court (*see* Affidavit of Charles F. Witthoefft attached hereto as Exhibit 1). Such flagrant and deliberate disregard of this court's orders should not be permitted and the following sanctions should therefore be imposed:

- (1) CUMIS' complaint should be dismissed with prejudice;
- (2) Default judgment in favor of GECU should be entered against CUMIS for GECU's counterclaim; and
- (3) GECU should be awarded its costs and attorneys' fees of \$9,916.71 as reflected in the attached affidavit of Charles F. Witthoefft.

No other sanctions would be equally effective, since CUMIS' actions have deliberately and effectively precluded GECU from proceeding with its case against CUMIS in any manner.

RESPECTFULLY SUBMITTED,

CHARLES F. WITTHOEFFT

LINDA L. ROYSTER

HIRSCHLER, FLEISCHER, WEINBERG,

COX & ALLEN

629 East Main Street

P. O. Box 1Q

Richmond, Virginia 23202

(804) 771-9562

By /s/ LINDA L. ROYSTER

JERRY NUGENT

ROBERT C. BASS, JR.

Rinehart & Nugent

1000 American Bank Tower

Austin, Texas 78701

(512) 476-6527

**Counsel for Government
Employees Credit Union**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201 and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P. O. Box 1584, Austin, Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, counsel for the defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P. O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E. G. Vorwerk, this 14th day of October, 1982.

/s/ LINDA L. ROYSTER

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

**AFFIDAVIT OF COUNSEL FOR GOVERNMENT
EMPLOYEES CREDIT UNION IN SUPPORT OF
SECOND MOTION FOR SANCTIONS AGAINST
PLAINTIFF**

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

Charles F. Witthoefft, being first duly sworn, deposes and says:

(1) Affiant is a member of the law firm of Hirschler, Fleischer, Weinberg, Cox & Allen of Richmond, Virginia. Affiant and Everette G. Allen, Jr. and Linda L. Royster, both of his firm, are co-counsel for defendant, Government Employees Credit Union ("GECU"), in this case. Jerry Nugent and Robert C. Bass, Jr., of the law firm of Rinehart & Nugent of Austin, Texas, are also co-counsel for GECU herein.

(2) Affiant is familiar with the various events relevant to GECU's second motion for sanctions against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), and he makes this Affidavit in support of such motion.

(3) On September 1, 1982, GECU was caused to file a motion for sanctions against CUMIS as a result of the fact that CUMIS had continued its unjustified refusal to produce documents originally requested by GECU on February 2, 1982, notwithstanding and in spite of the clear instructions of this Court in its August 4, 1982 Order to produce all such documents requested by GECU.

(4) On September 14, 1982, CUMIS filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit attacking the validity of this Court's August 4, 1982 order. In response to GECU's motion for sanctions, CUMIS' counsel wrote Judge Garcia's Law Clerk and stated, among other things, that "... in the event CUMIS' Petition for Mandamus is denied, CUMIS will fully comply with Judge Garcia's discovery order." On September 24, 1982, GECU served its response to CUMIS' petition for writ of mandamus, in which response GECU vigorously opposed the extraordinary relief requested by CUMIS.

(5) On Thursday, September 30, 1982, counsel for GECU, and presumably for CUMIS, were advised by telephone that the Fifth Circuit Court of Appeals had summarily denied CUMIS' mandamus petition. An order to that effect was entered by the Fifth Circuit on October 1, 1982.

(6) On Monday, October 4, 1982, Affiant telephoned James A. Knox, counsel for CUMIS, and inquired as to when and where CUMIS' production of documents responsive to GECU's February 2, 1982 First Request for Production of Documents would commence. Mr. Knox responded that his associate, Steven L. Baskind, had been in contact with CUMIS concerning the document production after the mandamus petition was denied, but that Mr. Knox did not know the content of that communication or when the production might begin. Mr. Knox stated that Mr. Baskind was out of the office until October 6, but that either he or Mr. Baskind would contact Affiant no later than October 6 to advise of CUMIS' position.

(7) On Wednesday, October 6, 1982, Mr. Baskind telephoned Affiant and informed him that Mr. Baskind was still unable to state with any clarity CUMIS' position with respect to the production of the requested documents. Whereas, Mr. Baskind noted, CUMIS recognized its obligation to produce the documents in light of the action of the Fifth Circuit, he still could not state how, when or where the documents would be produced. He suggested that the production could not start before the week of November 15, 1982, because of a conference or meeting that CUMIS' home office legal staff would be attending in late October or early November. Affiant responded that GECU was unwilling to wait until November 15 or thereafter to begin the review of documents which were requested over eight months ago, and which the Court had emphatically stated GECU's counsel was entitled to see. Affiant proposed that GECU commence immediately the production of at least some of the requested documents, and stressed that GECU was willing to cooperate with CUMIS to the greatest extent possible to facilitate production for both parties. Baskind agreed to consider the matter further with his client and to contact Affiant promptly to advise when the production would begin. No further communication between counsel for GECU and counsel for CUMIS has occurred since October 6, 1982, and CUMIS has produced no documents subsequent to the denial by the Fifth Circuit of its petition for mandamus.

(8) In the course of Affiant's telephone conversation with Mr. Baskind on October 6, 1982, he expressed an interest in reviewing GECU's documents and Affiant responded, as previously, that these documents are and have been for some time available for CUMIS' review, upon reasonable notice, at GECU's office in Austin, Texas. At Affiant's suggestion, Mr. Baskind indicated that he would contact Robert C. Bass, Jr., GECU's counsel in Austin, Texas, to make the necessary arrangements. Affiant is informed and believes that no such contact with Mr. Bass or any other representative of his firm has been made by CUMIS following the telephone conversation on October 6, 1982, between Affiant and Mr. Baskind.

(9) Upon information and belief, CUMIS' failure to produce its documents continues to be without justification or excuse, and is part of a continuing, bad faith effort by CUMIS to avoid its legitimate obligations to its insured, GECU, with respect to the losses described in GECU's Counterclaim herein.

(10) As repeatedly pointed out to CUMIS' counsel, and as stated to the Court in a letter from GECU's counsel dated September 9, 1982, GECU must review the documents of CUMIS responsive to its document request before GECU can intelligently proceed with further discovery. CUMIS' failure to comply with the subject document request, and this Court's orders with respect thereto, has significantly delayed GECU's preparation for trial, and threatens GECU's ability to complete its discovery prior to the discovery cutoff imposed by the Court.

(11) Attorney's fees totalling \$9,494.75, and expenses totalling \$421.96 have been incurred by counsel for GECU in twice moving this Court for sanctions against CUMIS, in responding to CUMIS' petition for writ of mandamus to the Fifth Circuit, and in otherwise seeking to obtain the production of CUMIS' documents requested in February, 1982. It is respectfully, submitted that CUMIS should be required to pay such reasonable expenses, incurred entirely with respect to GECU's efforts to require CUMIS to comply with GECU's First Request for Production of Documents, the orders of this Court, and the decision of the Fifth Circuit.

/s/ **CHARLES F. WITTHOEFT**

Charles F. Witthoefft

Subscribed and sworn to before me this 14th day of October, 1982.

/s/ **MARY A. FARMER**

Notary Public

My Commission Expires: 9-04-83

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201 and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P. O. Box 1584, Austin, Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, counsel for the defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lochridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P. O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E. G. Vorwerk, this 14th day of October, 1982.

/s/ **LINDA L. ROYSTER**

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,

Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,

Defendants.

THIRD MOTION FOR SANCTIONS
AGAINST PLAINTIFF

Defendant, Government Employees Credit Union ("GECU"), by counsel, pursuant to Rule 37 of the Federal Rules of Civil Procedure, respectfully moves the Court to impose against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), the sanctions specified below as a consequence of CUMIS' unjustified failure and refusal to comply with this Court's August 4, 1982, and September 22, 1982 Orders compelling CUMIS to produce the documents responsive to GECU's First Request for Production of Documents, filed herein on February 2, 1982.

(A) That CUMIS be adjudicated to be in contempt of this Court as a result of its willful refusal to comply with the August 4, 1982, and September 22, 1982 Orders, and that CUMIS be required to pay punitive damages to GECU in an appropriate amount to punish it for such contumacious conduct;

(B) That an order be entered striking and dismissing with prejudice CUMIS' Complaint and First Amended Complaint against GECU, and that an order of default judgment be entered against CUMIS on GECU's Counterclaim;

(C) That CUMIS pay to GECU its reasonable expenses, including attorney's fees, caused by CUMIS' unjustified failure to comply with the August 4, 1982, and September 22, 1982 Orders of this Court;

(D) That CUMIS be ordered to produce copies of the remaining documents responsive to GECU's request at the offices of GECU's counsel on or before December 31, 1982.

This Motion is based upon the papers previously filed herein and the Affidavit of Linda L. Royster, co-counsel for GECU, attached hereto as "Exhibit A".

Pursuant to Local Rule 14(n) of this Court, counsel for GECU advises the Court that, as is more fully described in Exhibit A hereto, counsel for GECU have, in good faith, conferred personally with CUMIS' counsel, but have been unable to resolve the impasse caused by CUMIS' failure to produce the documents as required.

Respectfully submitted,

EVERETTE G. ALLEN, JR.
CHARLES F. WITTHOEFT
LINDA L. ROYSTER
HIRSCHLER, FLEISCHER, WEINBERG,
COX & ALLEN
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By /s/ LINDA L. ROYSTER

JERRY NUGENT
ROBERT C. BASS, JR.
RINEHART & NUGENT
1000 American Bank Tower
Austin, Texas 78701
(512) 476-6527

Counsel for Government
Employees Credit Union

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to James A. Knox and Stephen L. Baskind, Vial, Hamilton, Koch, Tubb, Knox & Stradley, 1150 Republic Bank Tower, Dallas, Texas 75201 and John C. Wilson, Wilson & Grosenheider, 711 West Second Street, P. O. Box 1584, Austin, Texas 78767, counsel for the plaintiff; Robert C. Howell, 711 West Seventh Street, Austin, Texas 78701, and John Coates, Clark, Thomas, Winters & Shapiro, P. O. Box 1148, Austin, Texas 78767, counsel for the defendant, Doris D. Bolton; Lloyd Lochridge and James R. Raup, McGinnis, Lockridge & Kilgore, Republic Bank Tower, 900 Congress, Austin, Texas 78701, counsel for the Defendant Directors; and Thomas Watkins, Hilgers, Watkins & Kazen, P.C., P. O. Box 2063, City National Bank Building, Austin, Texas 78768, counsel for E.G. Vorwerk, this 3rd day of December, 1982.

/s/JERRY NUGENT

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,

Plaintiff.

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

**AFFIDAVIT OF COUNSEL FOR
GOVERNMENT EMPLOYEES CREDIT UNION
IN SUPPORT OF THIRD MOTION FOR
SANCTIONS AGAINST PLAINTIFF**

STATE OF VIRGINIA

CITY OF RICHMOND, to-wit:

Linda L. Royster, being first duly sworn, deposes and says:

(1) Linda L. Royster is a member of the law firm of Hirschler, Fleischer, Weinberg, Cox & Allen of Richmond, Virginia. She, along with Everette G. Allen, Jr. and Charles F. Witthoefft, both of her firm, are co-counsel for defendant, Government Employees Credit Union ("GECU"), in this case.

(2) Linda L. Royster is familiar with the various events relevant to GECU's third motion for sanctions against plaintiff, CUMIS Insurance Society, Inc. ("CUMIS"), and she makes this Affidavit in support of such motion.

(3) On November 15, 1982, at approximately 1:30 p.m., I arrived at the offices of CUMIS in Madison, Wisconsin, with another attorney, Michael P. Falzone, and with two legal assistants, to review those documents which CUMIS had indicated would be produced in response to GECU's first request for production of documents. Counsel for CUMIS had previously provided to counsel for GECU the information that only files relating to claims based on investment losses would be produced. Only a part of these documents were in fact available for review on November 15, 1982. However, I was informed by counsel for CUMIS, Steven L. Baskind, and by John Eliason, CUMIS' in-house counsel, that Eliason would continue to review documents so that they would be ready for production as we completed our review of those already produced.

(4) On November 16, 1982, some additional documents were produced; however, I was informed that all investment files could not be produced during that trip to Wisconsin, since Mr. Eliason had other business to attend to; rather, I would have to return to Wisconsin to review the remaining investment files. In addition, I was informed that CUMIS presently had no plans to review documents other than those relating to claims based on investments, no plans presently to produce such other documents, and that production of the material requested and ordered by the court to be produced would take approximately one and one-half years. Indeed, both Mr. Baskind and Mr. Eliason stated that CUMIS would produce documents at its convenience without altering its business in any significant way until such time as sanctions were imposed by the court forcing CUMIS to accelerate production. I was further informed that outside counsel for CUMIS in this litigation did not intend to assist in reviewing documents on behalf of CUMIS so that they might be produced; all review was performed by two members of CUMIS' in-house counsel staff.

(5) Review by GECU's counsel of the documents which were produced consumed approximately 3 hours on November 15, 1982, approximately 7 hours on November 16, 1982, and approximately 4 hours on November 17, 1982. Review of all produced documents was completed by 12:30 p.m. on Novem-

ber 17, 1982, at which time no other documents were available for production. GECU's counsel and staff were ready, willing and able to remain in Wisconsin to review additional documents responsive to its document request, but returned to Virginia when advised that no additional documents were available.

(6) Having requested copies of certain documents, and having received copies only of documents copied prior to 12:30 p.m. on November 17, 1982, I contacted John Eliason by telephone on November 24, 1982. I was informed by Mr. Eliason that some of the documents which we requested had been copied and would be sent to counsel for GECU by United Parcel Service on November 24, 1982. Mr. Eliason was unwilling to state when copying of other requested documents would be completed, however, he agreed to discuss the matter with his secretary to determine when it would be convenient for her to complete the copying. Similarly, Mr. Eliason was unwilling to commit to a date by which CUMIS' review of the remaining investment loss files would be completed and those documents available for production, although he suggested that those documents might be available on or about December 8, 1982, or during the following week. Copies of some documents were received by counsel for GECU on November 29, 1982; an unsigned handwritten note included with them stated that remaining copies "hopefully" could be forwarded in two to two and one-half weeks.

(7) Fees incurred for attorneys and legal assistants during the trip to Wisconsin were \$5445.00; expenses for room, meals, and transportation were \$2,404.80.

/s/ **LINDA L. ROYSTER**

Linda L. Royster

The foregoing Affidavit was acknowledged before me this 1st day of December, 1982.

/s/ **MARY A. FARMER**

Notary Public

My Commission Expires: 9-04-83

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-82-CA-13

CUMIS INSURANCE SOCIETY, INC.,
Plaintiff,

v.

GOVERNMENT EMPLOYEES CREDIT UNION, *et al.*,
Defendants.

**GECU'S MEMORANDUM IN SUPPORT
OF THIRD MOTION FOR SANCTIONS**

On February 2, 1982, the defendant, Government Employees Credit Union ("GECU"), served its request for production of documents on CUMIS Insurance Society, Inc. ("CUMIS"). On August 4, 1982 and September 22, 1982, this Court entered orders compelling CUMIS to produce documents requested by GECU. GECU served its Second Motion for Sanctions on October 14, 1982, as a result of CUMIS' continued failure to produce the documents requested by GECU, even after CUMIS' petition for writ of mandamus to the United States Court of Appeals for the Fifth Circuit was denied on October 1, 1982. Reference is made to GECU's first and second motions for sanctions and the supporting affidavits filed therewith.

At the time CUMIS filed its petition for writ of mandamus, it communicated to this Court by letter dated September 9, 1982, that "in the event CUMIS' Petition for Mandamus is denied, CUMIS will fully comply with Judge Garcia's discovery order." Although GECU objected to CUMIS' lengthy delay in

producing documents following the denial of its petition for writ of mandamus, the parties were admonished in a conference call with Mark Dietz on November 3, 1982 to make greater efforts to cooperate concerning document production. Subsequently, counsel for GECU were informed that although document production would begin on November 15, 1982, only those files concerning investment losses by credit unions for which claims were made against CUMIS would be produced. GECU acceded to this piecemeal approach to production in an effort to cooperate.

However, when four persons representing GECU, including two attorneys and two legal assistants, arrived in Madison, Wisconsin on November 15, 1982 to review the documents, they were informed that CUMIS would not produce even the investment loss files which had been promised on that date. Counsel for GECU completed review of the few documents produced in approximately one and one-half days and left Wisconsin because no other documents were available for review. Furthermore, counsel for GECU was blatantly informed that CUMIS intended to review and produce documents at its own convenience, and did not have any present intention to review or produce any documents other than the investment loss files. CUMIS' counsel boldly asserted to counsel for GECU that CUMIS was unwilling to expend the slightest effort to cooperate with GECU in the production of documents unless and until sanctions are imposed by this Court requiring it to do so.

As the affidavit to this memorandum reflects, the trip to Madison, Wisconsin to review the few documents which CUMIS was willing to produce cost GECU \$2,404.80 in expenses, and \$5,445.00 in fees for attorneys and legal assistants was incurred. It would be utterly unconscionable to require GECU to expend these sums when CUMIS is unwilling to cooperate even to the extent of producing the limited documents which they had agreed to produce on November 15, 1982. CUMIS' utter refusal to comply with the orders of this Court mandate the sanctions requested in GECU's Third Motion for Sanctions. In particular, CUMIS' behavior in first

promising to begin production on November 15, 1982, then stating that only a very limited number of documents would be produced on that day, and then not even producing the promised documents or informing counsel for GECU that they would not be produced, indicates that CUMIS should bear the costs associated with that trip, including attorney's fees, and should be required to produce legible copies of the remaining documents at the offices of counsel for GECU.

Respectfully submitted,

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**Counsel for Government
Employees Credit Union**

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/s/JERRY NUGENT